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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DEIRDRE V. BATCH,

Petitioner,

v.

TOWN OF CHAPEL HILL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

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QUESTIONS PRESENTED

1. Can a local government, consistent with the takings clause of the Fifth Amendment as applied to the states through the Fourteenth Amendment, use its police power to require coordination of a proposed subdivision with a planned thoroughfare for the purpose of decreasing future condemnation costs, when the need for and benefits of the planned thoroughfare are completely unrelated to the subdivision upon which the coordination requirement is imposed?

2. When a plaintiff brings a Section 1983 action in state court, alleging that a city council has denied a subdivision application for an unconstitutional reason, may a state, consistent with principles of federalism, the Supremacy Clause, and 42 U.S.C. Section 1983, bar plaintiff from litigating her Section 1983 claim by (i) imposing a requirement that the validity of the council's actions be first tested in a judicial review proceeding that does not allow *de novo* review of the council's own findings as to the reasons why it denied the subdivision, and (ii) giving preclusive effect to the determination in the prior proceeding that the subdivision was denied for a constitutional reason?

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TOWN OF CHAPEL HILL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

The petitioner Deirdre V. Batch respectfully prays that a writ of certiorari issue to review the judgment and opinion of the North Carolina Supreme Court entered in the above-entitled proceeding on January 18, 1990.

OPINIONS BELOW

The opinion of the North Carolina Supreme Court is reported at 387 S.E.2d 655, and is reprinted in the appendix hereto, p. 1a, *infra*.

The opinion of the North Carolina Court of Appeals is reported at 92 N.C. App. 601, 376 S.E.2d 22, and is reprinted in the appendix hereto, p. 19a, *infra*.

JURISDICTION

Judgment was entered by the North Carolina Supreme Court on January 18, 1990.

The jurisdiction of this Court to review the judgment of the North Carolina Supreme Court is invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONST. amend. V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived or life, liberty, or property, without due process of law; *nor shall private property be taken for public use without just compensation.*

U.S. CONST. amend. XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law that shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. Article VI, Section 2.

This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

42 U.S.C. Section 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioner Deirdre V. Batch is the owner of a tract of land containing approximately twenty (20) acres located on Old Lystra Road in Orange County, North Carolina, outside the corporate limits of the Town of Chapel Hill but within its extraterritorial planning jurisdiction. Petitioner is not a commercial developer. She is a physician and the mother of five children. She has never previously developed property nor does

she expect ever again to be involved in the development of property. Petitioner purchased the property with the intent to live there. She eventually determined that subdividing the property was the only practical way for her to afford the home she wanted for her family. At the time she purchased the property, petitioner did not know the Town of Chapel Hill planned to put through the property a major thoroughfare known as the Laurel Hill Parkway.

In June of 1986, petitioner prepared an application for a "minor" subdivision (which requires approval by the town manager under the town's development ordinance) consisting of several lots, all fronting Old Lystra Road (i.e. no new street was proposed). On July 8, 1986, town development coordinator Dave Roessler responded by letter that Dr. Batch's application could not be approved as submitted and had to be referred to the major subdivision review process (which requires approval by the town council), among other reasons, because the plan did "not comply with the town's thoroughfare plan by providing right-of-way for the extension of Laurel Hill Parkway." This letter was preceded by an internal staff memorandum from David C. Bonk, the town's transportation planner, recommending as a condition of approval of this subdivision "[t]he dedication of 90' of right-of-way through this property for the Laurel Hills [sic] Parkway," and stating that "[n]o access to the parkway will be allowed from this property." As recounted in the court of appeals' opinion, the need for this parkway arose "not as a result of [petitioner's] subdivision plan, but because of pre-existing traffic congestion on Highway 15-501 created by the general community, not [petitioner's] proposed subdivision. In addition,

plans for the parkway are indefinite both as to financing and timing" (p. 37a, *infra*).

Following the town's determination that she needed to apply through the major subdivision process, petitioner applied to the town on or about September 16, 1986 for a permit to subdivide her property into eleven (11) lots, one of which she intended to use as her personal residence. (The configuration of proposed lots, and their relation to the proposed parkway, is illustrated in the plat map reproduced in the N.C. Supreme Court's opinion, *infra*, p. 5a). Attached to the revised application was a memorandum from petitioner's attorney, setting forth the applicant's position that the road dedication requirement could not lawfully be imposed but otherwise expressing petitioner's intention "to cooperate with the town in meeting every legitimate requirement of the ordinance."

After reviewing petitioner's subdivision application, the town staff on December 3, 1986 informed petitioner in writing that the application was, in the planning staff's judgment,inconsistent with the town's development ordinance in eight (8) specific respects. In response to the planning staff's review, petitioner submitted revisions to her application correcting all of the purported "deficiencies" except the staff's determination that Dr. Batch was required to (i) extend water and sewer lines to the project (at a cost of more than $750,000 and requiring easements over properties not under petitioner's control), (ii) dedicate an additional ten feet of right-of-way and construct an additional twelve feet of pavement and curb and gutter along petitioner's 973 feet of frontage on Old Lystra Road, and (iii) "incorporate the Town's adopted

thoroughfare plan for the extension of Laurel Hill's [sic] Parkway" (the 90 feet of right-of-way consumes over two acres of petitioner's tract).

Petitioner's application was reviewed by the town's planning board on January 6, 1987. At that meeting, town development coordinator Dave Roessler stated to the board: "One of the major concerns is that the alignment of the adopted Laurel Hill Parkway of the Chapel Hill/Carrboro Thoroughfare Plan goes right through this property. The applicant has failed to show the right-of-way through the property there. . . . So we are recommending that the right-of-way be provided or be preserved through this particular piece of property." Counsel for petitioner again registered Dr. Batch's objection to the dedication requirement, but the planning board voted to recommend that petitioner's application be denied.

Between the planning board meeting and the town council's consideration of petitioner's application, petitioner submitted a memorandum to the town council, a letter to the town manager, and a letter to the town attorney, reiterating petitioner's objections to the Laurel Hill Parkway dedication requirement and petitioner's reasons therefor but expressing petitioner's "desire to compromise and go along with any legal and financially feasible requirements that the Town of Chapel Hill may impose." Neither orally nor in writing did the town or any of its representatives ever communicate to petitioner that the town was seeking anything other than *dedication* of the parkway right~~-of-way or~~ that some other form of "coordination" with the thoroughfare plan would have been acceptable.

At the hearing before the Chapel Hill Town Council on March 9, 1987, the agenda packet included all of the above-referenced memoranda and letters from petitioner's counsel that explained petitioner's position on the parkway issue. Furthermore, petitioner's counsel restated this same position in oral argument to the council. Again, no member of the council suggested that the town sought only "coordination" rather than dedication. Indeed, as the following interchange between petitioner's counsel (Brough) and the town's planning director (Waldon) reveals, the town rejected petitioner's invitation to state whether something other than dedication might be acceptable, and if so what that might be.

> MR. BROUGH. Do I understand that your recommendations do not include the construction of the parkway, simply the—you have requested that the applicant preserve or dedicate, not reserve, but dedicate the right-of-way for the parkway, but the staff has not required that the applicant also construct the parkway; is that correct?
>
> MR. WALDON: What this recommendation says is that this application does not take into account and does not meet the requirements of having streets which coordinate with existing and planned streets. So our recommendation is denial, and one of the reasons for the recommendation is that this application does not take into account existing and planned streets.
>
> MR. BROUGH: If we showed the application complying with the dedication of the

area where you had shown the parkway proposed, would that be sufficient to satisfy your concerns about the Laurel Hill Parkway?

MR. WALDON: That is not the application that is before us.

MR. BROUGH: I understand that is not the application before you. What I am trying to understand is, is it your concern that you have expressed—you have said there is a problem with the fact that we haven't shown the parkway, haven't complied.

What would we need to do to comply with the parkway requirements, dedicate the road or build the road? Sorry—dedicate the right-of-way, or build the road?

MR. WALDON: What we have reviewed is the application. What we say in review of this application is that it is not approvable. It does not, and clearly does not, meet our requirements for coordinating with existing and planned streets.

MR. BROUGH: *What would we have to do to make it coordinate with the existing and planned streets with respect to the Laurel Hill Parkway? I'm simply trying to understand what is wrong with the application.*

MAYOR WALLACE: I am afraid at this point, Mr. Brough, that any further continuation of this discussion might very well be beyond the scope of this particular swearing-in, and that the council has before it a set of specific questions. I don't believe that any

> kind of search party at this particular time is in order.
>
> So therefore, *I will rule you out of order* at this time, and we will proceed.

Following the hearing, with almost no discussion, the council adopted a resolution denying petitioner's application. That resolution contained the four "findings" set forth in the North Carolina Supreme Court's opinion. The one most relevant here is the council's conclusion that the development, as proposed, "Does not have streets which coordinate with existing and planned streets and highways as required by Sections 7.7.1 and 6.5.1 of the Development Ordinance" (*infra*, p. 8a).

Petitioner filed a complaint and a petition for writ of certiorari on April 8, 1987, seeking declaratory and injunctive relief, damages, and attorneys fees. As noted in the North Carolina Court of Appeals opinion, petitioner's claims included (1) violation of due process, (2) taking of property, (3) denial of equal protection, (4) temporary taking, (5) violation of civil rights pursuant to 42 U.S.C. Section 1983, and (6) inverse condemnation pursuant to N.C.G.S. Section 40A-51 (*infra*, p. 21a). The petition for writ of certiorari was joined with the complaint in order to bring the record of the council's decision in this matter before the trial court for review as part of petitioner's action.

Respondent Town of Chapel Hill filed an answer on May 13, 1987 which included a defense that joinder of the petition for writ of certiorari with the other claims set forth in the complaint was improper. In response, petitioner filed a motion seeking a determination that petitioner's claims were properly joined. At the hearing on this motion on August 17, 1987,

petitioner submitted a brief arguing that "[t]he principles of comity and federalism dictate that state courts may not discriminate against federal claims where comparable state claims would be allowed." Petitioner's concern, stated in that brief (and repeated in the brief submitted to the North Carolina Supreme Court), was two-fold. First, given the limited type of review available in North Carolina pursuant to a writ of certiorari, petitioner could assert constitutional claims as a basis for seeking reversal of the council's decision but could not obtain damages or attorneys fees, and thereby would be deprived of the full relief available under 42 U.S.C. Section 1983 and Section 1988. Second, petitioner was concerned that applicable principles of *res judicata* "could bar [petitioner] from pursuing her remedy under the federal civil rights statute after the court's review of [petitioner's] action 'on the record' in the nature of certiorari." The trial court granted petitioner's motion and issued an order (*infra*, p. 55a) that states, *inter alia*:

> These claims are hereby determined to be properly joined, and it is hereby determined that the writ of certiorari has been joined for the ancillary purpose of bringing up to the Superior Court the records that were before Defendant's Town Council at the hearing of the Plaintiff/Petitioner's application for subdivision approval. This action shall proceed according to the rules of evidence and procedure governing a civil action at law rather than the rules applicable to a proceeding in the nature of certiorari.

On October 27, 1987, petitioner filed a motion for summary judgment on all claims, together with sup-

porting affidavits and materials. Notably, neither petitioner nor respondent ever requested or sought to calendar a hearing for a review on the record, i.e. a review "in the nature of certiorari" as the practice is known in North Carolina. Rather, the matter next came before the Orange County Superior Court on December 15, 1987 solely for a hearing on petitioner's motion for summary judgment. Following that hearing, the trial court entered an order on December 31, 1987 granting petitioner's motion and virtually all of the relief requested (*infra*, p. 49a). In particular, the court found there to be no genuine dispute that petitioner's application was denied for the three reasons asserted in the complaint, including her failure to indicate on her proposed plat an intent to dedicate right-of-way for the proposed Laurel Hill Parkway. The court then concluded that, absent compensation, this parkway dedication requirement constituted an unlawful taking in violation of the Fifth and Fourteenth Amendments to the United States Constitution as well as a deprivation of property without due process of law in violation of the Fourteenth Amendment.

The North Carolina Court of Appeals affirmed the trial court in every essential respect, except that it concluded that summary judgment was erroneously granted on the Lystra Road widening issue because a genuine issue of material fact existed as to whether that exaction satisfied the "proportionality test" set forth in the opinion (*infra*, p. 41a). The court affirmed the trial court's ruling on the joinder of claims issue and specifically affirmed the portions of the summary judgment order that identified the reasons for the denial of the subdivision application, stating:

> Defendant contends that there may have been other reasons that the subdivision application was denied. We disagree. Careful review of the affidavits in support of summary judgment, the record of the Town Council meeting of 9 March 1987, other documents properly before the court, and the transcript of the summary judgment hearing, support the Superior Court's conclusions as to why the application was denied. Defendant came forward with no evidence that the denial was for any other reason.

(*infra*, p. 27a).

The North Carolina Supreme Court granted discretionary review and on January 18, 1990 issued its opinion reversing the court of appeals. The court first concluded that it was error to allow joinder of the certiorari proceeding with the other claims alleged in the complaint. The court held that the superior court was sitting, not as a trial court, but "as an appellate court reviewing the town's quasi-judicial subdivision permit hearing," and therefore the question before the court was whether there was competent evidence in the record to support the council's statements as to the reasons it denied the subdivision. The court said that the record contained no evidence that the application was rejected for failure to dedicate right-of-way for the parkway, but did contain evidence to support the council's "second finding that Dr. Batch's subdivision application failed to take into account present and future road plans as set forth in the town's thoroughfare plan." The court concluded that the town was authorized to require such "coordina-

tion" and therefore the council's decision should have been affirmed (*infra*, pp. 13a-15a).

In holding that the town could "legitimately compel a developer to anticipate planned road development," (*infra*, p. 16a), the court specifically rejected petitioner's takings argument. The first statement ever presented to petitioner as to how she could have "coordinated" her subdivision plan with the proposed parkway without dedication appeared in the amicus briefs in support of the town's position (as appellant) before the North Carolina Supreme Court, wherein it was suggested that petitioner might have moved her cul-de-sac to align more closely with the proposed parkway to reduce the cost of future road improvements. Responding to this effort to shift the focus of the litigation, Petitioner argued in its brief that, even if the court concluded that dedication had not been required, a "coordination" requirement would just as surely constitute a taking if imposed to lower the price the town would subsequently have to pay to acquire the right-of-way.

As indicated, the court rejected this argument and held not only that dedication had not been required but that the type of "coordination" that was required was "legitimate." This said, the court concluded that summary judgment should have been granted with respect to the takings claim and other claims asserted in the complaint since the court's conclusion in the certiorari review of the council's action constituted *res judicata* (*infra*, p. 17a).

REASONS FOR GRANTING THE WRIT

I. The North Carolina Supreme Court's determination that a town can compel a property owner to "coordinate" a proposed subdivision with a planned thoroughfare for the purpose of decreasing future condemnation costs, when the need for and benefits of the thoroughfare are totally unrelated to the proposed subdivision, conflicts with applicable decisions of this Court.

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1978), the Court established three principles that are relevant to this case. First, it held that in takings cases the Court will require a greater demonstration of a relationship between a legitimate objective and the regulatory measure than is demanded in due process or equal protection cases. Specifically, the test is whether the regulation *substantially* advances a legitimate state interest, rather than the more limited inquiry of whether the state could rationally have decided that the regulation might achieve the state objective. 483 U.S. at 834, n.3. Second, the Court articulated what should be (but apparently is not) a self-evident proposition, that "[w]hatever may be the outer limits of 'legitimate state interests' in the takings and land use context . . . the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation . . . is not one of them." 483 U.S. at 837. Finally, in note 4 of its opinion, 483 U.S. at 835, and by its reference to a multitude of state cases stating the same view, 483 U.S. at 839, the Court established what has become known as the "proportionality principle." As succinctly stated by the N.C. Court of Appeals, in reliance on *Nollan*, this principle requires an inquiry as

to "whether the condition imposed is proportionally related to the impact of the development." This principle, which is really no more than a reflection of the basic idea that the takings clause was designed to "bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49 (1960), has been recognized as an essential teaching of *Nollan* by other state courts, *see Unlimited v. Kitsap County*, 50 Wash.App. 723, 750 P.2d 651 (1988), *Seawell Associates v. City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059 (1989), as well as prominent commentators. *See* R. Freilich, "Finetuning The Taking Equation: Applying it to Development Exactions," 40 Land Use Law & Zoning Digest 3 (March 1988); 1 Shonkwiler and Morgan, *Land Use Litigation*, Section 11.04 (Supp. 1988); J.S. Kayden, "The Nollan Case" in Haar and Kayden, eds., *Zoning and The American Dream: Promises Still to Keep*, (Chicago, American Planning Association, 1989).

The foregoing principles from *Nollan* have an important and direct bearing on the widespread practice followed by local governments of exacting concessions—in the form of cash payments, land dedications, or construction of public improvements—as the "price" of obtaining development permission under zoning and subdivision ordinances. As is true of most constitutional principles, the line between the permissible and impermissible in this area is not always clear. However, in the case at hand, had the North Carolina Supreme Court concluded (as did the trial court and court of appeals) that the Town of Chapel Hill had insisted upon dedication of the Laurel Hill

Parkway right-of-way as a prerequisite to approval of petitioner's subdivision application, there is little doubt that *Nollan* would have dictated an affirmance of the court of appeals. Indeed, counsel for the town conceded as much (for the first time) in oral argument before the North Carolina Supreme Court.

But while *Nollan* may speak plainly to a dedication requirement in circumstances such as the case at hand, its impact on lesser forms of exactions or intrusions needs to be clarified by this Court. In particular, the relationship between *Nollan* and the long-standing doctrine that a local government may not use its regulatory power to lower future condemnation costs needs to be examined. Such activity, sometimes called "planning blight," *see* Rathkopf, *The Law of Zoning and Planning*, Sections 6.11 and 52.02 (4th ed. 1989) and cases cited, can take many forms, including downzoning, failure to rezone, denial of a building or zoning permit, or as in the present case, denial of a subdivision application, all designed to limit or prevent development in order to lower the costs to the general public of the future acquisition of private property needed for some public improvement. In petitioner's view, *Nollan* reaffirms the principle established in numerous cases cited in the above-referenced sections of *Rathkopf* that the police power may not be exercised to further the government's acquisitive objectives, at least under circumstances where the development upon which the exaction is imposed neither contributes to the need for nor benefits from the proposed public improvement. In this regard, the difference between a dedication requirement (wherein the government acquires right-of-way) and a "coordination" requirement (wherein the de-

veloper is required to "take into account" a proposed thoroughfare by locating lots in a manner that is disadvantageous to the property owner but that preserves the highway corridor for possible acquisition by the government at some indefinite time in the future) is essentially one of degree rather than of kind. Both are prohibited by *Nollan*, and the North Carolina Supreme Court's holding ignores this principle and should be reversed.

A recent case from another state provides an excellent illustration of how at least one jurisdiction has recognized the principle that petitioner seeks to have this court affirm in this case, that under *Nollan* the police power cannot be exercised for the purpose of lowering future acquisition costs. In *Department of Transportation v. Amoco Oil Company*, 174 Ill.App.3d 479, 528 N.E.2d 1018, *appeal denied*, 123 Ill.2d 556, 535 N.E.2d 400 (1988), the Department of Transportation had issued a permit allowing access to a highway but added to the permit a condition that no improvements placed on the property, including access entrances authorized by the permit, would be allowed to increase the value of the right of access if later terminated by the Department in connection with a planned road-widening project. Citing *Nollan*, the court invalidated the condition on the basis that it was plainly not related to legitimate public health or safety concerns but was designed to serve the illegitimate objective of lowering condemnation costs. The court observed that the Department was authorized to promote safety and convenience of highway traffic and eliminate the danger of accidents by regulating access driveways, but that this purpose was "not served by a condition on a permit *granting* ac-

cess which solely seeks to depress the property value in anticipation of future acquisition." (Emphasis in original). 528 N.E.2d at 1024. Similarly, in petitioner's case, the town was authorized to require coordination of proposed streets, for example, to provide for connection or realignment with other existing or proposed streets that form part of an integrated street system in order to provide access for emergency vehicles and through traffic in the interest of the public safety. No such interest was promoted, however, by a requirement that a street be relocated solely to accommodate a parkway to which there will be no access from abutting lots and the need for which is completely unrelated to the proposed project. The North Carolina Supreme Court's failure to recognize that a town may not exercise its regulatory authority for the purpose of lowering future condemnation costs stands in stark contrast to the interpretation of *Nollan* made by the Illinois Court of Appeals, and this Court should take jurisdiction of this case to clarify this important aspect of takings jurisprudence.

The facts of the instant case certainly present this Court with an appropriate vehicle to make this clarification. It is undisputed that the need for the proposed parkway was recognized long before Dr. Batch proposed to develop her property, was unrelated to any development of her property, and would not benefit her property since the parkway was intended to be a limited access facility. The North Carolina Supreme Court concluded that petitioner's proposed subdivision plan "failed to take into account present or future road plans" because it "would place four of eleven large residential building sites directly in the path of the proposed parkway" (*infra*, p. 14a).

The court was not more specific as to how petitioner could have "anticipated planned road development in some logical manner" (*infra*, p. 16a), but it is apparent that this could only be accomplished either by relocating the proposed cul-de-sac to align more closely with the proposed parkway right-of-way or by otherwise redesigning the street and lot pattern so that it no longer placed lot sites "directly in the path of the proposed parkway." In other words, the proposed parkway right-of-way had to be reserved or at least preserved, if not formally dedicated. Even a cursory examination of the map shown *infra* p. 5a reveals that such "coordination" could only be achieved at some considerable expense to petitioner as a result of lost lots or the creation of lots configured in an undesirable manner. Of course, any cost imposed on petitioner as a result of complying with a requirement having some actual relationship to a legitimate public health or safety objectives would be *damnum absque injuria*. But that is not the case here. The *only* reason petitioner was required to "coordinate" with the Laurel Hill Parkway was because she had the misfortune of owning property that lay within the path of the proposed parkway, and the only benefit that accrued from such "coordination" was the benefit to the general public of paying fewer dollars to acquire right-of-way in a future condemnation proceeding. *Nollan* teaches that the police power cannot be so exercised, and the facts of the instant case present an excellent opportunity to reaffirm this principle.

The principle involved in this case extends far beyond the jurisdictional boundaries of North Carolina. For example, many states have "Official Map Acts"

that, in one form or another, authorize local governments to limit or prohibit development that lies in the path of future highway corridors. *See* Rathkopf, *The Law of Zoning and Planning*, Chapter 33, Section 33.03, and Section 46.03[3] (4th ed. 1989). Petitioner by no means suggests that such statutes are necessarily invalid under *Nollan* or would be invalidated by a ruling in petitioner's favor. However, given the express prohibition in *Nollan* of unlawful *dedication* requirements, local governments are increasingly likely to rely on the authority contained in these or similar statutes to impose conditions that may fall short of requiring outright dedication or conveyance of property but that are designed solely to lower future acquisition costs. If "compliance with [the Fifth Amendment's taking clause is] to be more than an exercise in cleverness and imagination," *Nollan*, 483 U.S. at 841, this Court will need to address the constitutional validity of such efforts. This case presents the opportunity.

II. The North Carolina Supreme Court's rulings that (i) before litigating her Section 1983 claim that a city council had denied her subdivision application for an unconstitutional reason, petitioner was first required to seek review of the council's action in a proceeding that required the trial court to defer to the council's own findings as to the reasons it denied the application, and (ii) the determination in the limited review proceeding that the subdivision was denied for a lawful reason bars further litigation of that issue in petitioner's Section 1983 case, are in conflict with the decisions of this Court.

The North Carolina Supreme Court overruled the trial court and Court of Appeals and held that the joinder of a petition for writ of certiorari with other

claims in petitioner's complaint was error. Normally, a question about proper joinder of claims in a state proceeding would not present a question justifying the exercise of jurisdiction by this Court. However, in the context of this case, the deliberate and actual effect of the court's ruling was to impose on petitioner a requirement that her constitutional claims be first determined in an administrative review type proceeding, where the town council's own findings as to the reasons why it acted—the very heart of petitioner's Section 1983 claims—were subject only to limited judicial review. In light of the court's conclusion that the determination in the certiorari proceeding that the council acted for a legitimate reason precluded further litigation of this issue in petitioner's Section 1983 case, it is plain that what in form was a ruling on joinder was in essence a decision that places the North Carolina Supreme Court squarely in conflict with the principles announced by this Court in *Felder v. Casey*, ___ U.S.___, 108 S.Ct. 2302 (1988) and *Kremer v. Chemical Construction Corporation*, 456 U.S. 461 (1982).

To understand the significance in this case of the North Carolina Supreme Court's decision on the joinder issue, as well as its wider implications, the Court must understand the difficulties faced by petitioner in deciding where and how to seek redress for the violation of her constitutional rights—difficulties that confront most property owners who believe that a denial of development permission has violated the takings clause, either because such denial did not further a *legitimate* objective, did not *substantially advance* a legitimate objective, or deprived the owner of all economically viable use of the property. In *William-*

son County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985), this Court instructed potential plaintiffs that a "ripe" takings claim could not be filed in federal court unless and until compensation was sought and denied in state court (assuming the state provided such a remedy, which North Carolina does in Chapter 40A of the North Carolina General Statutes). Furthermore, lower federal courts have shown a rather strong disposition to abstain in land use cases, even when a case presents federal issues that would justify the courts' exercise of jurisdiction. *See, e.g., Caleb Stowe Associates, Ltd. v. County of Albermarle, Va.*, 724 F.2d 1079 (4th Cir. 1984). *See, generally*, 1 Shonkwiler and Morgan, *Land Use Litigation*, Section 18.02. In other words, federal courts are exerting a rather strong push in the direction of having land use claims in general, and takings claims in particular, litigated in the state courts.

Moreover, once in state court, a plaintiff must "play to win," *Mitchell v. Mills County Iowa*, 673 F.Supp. 332, 336 (E.D. Mo. 1987), because an adverse decision will be given the preclusive effect mandated by state law in a subsequent Section 1983 action. *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984). And this preclusive effect applies not only to issues that were litigated but those that might have been litigated, *Migra*, at least in states such as North Carolina where that is the state rule. *Stewart v. Hunt*, 598 F.Supp. 1342 (E.D.N.C. 1984).

Petitioner in this case, then, (like others similarly situated) had no choice but to file her case in state court. This would not have been a daunting prospect if it were clear that the state court was free to decide disputed issues of fact according to the greater weight

of the evidence presented in court pursuant to normal rules of evidence and civil procedure. However, in North Carolina (and many other states as well), the exclusive statutory remedy for reviewing permit decisions made by a city granting or denying development permission under a zoning ordinance is a procedure "in the nature of certiorari." N.C.Gen.Stat. Sections 160A-381, -388. As the North Carolina Supreme Court explains in the opinion at issue here (*infra*, p. 13a), in a certiorari proceeding the superior court sits as an appellate court. It hears no evidence and makes no findings of fact, but only reviews the record to determine whether the findings made by the board or council were supported by competent evidence. The state subdivision enabling act, N.C.Gen.Stat. Ch. 160A, Art. 19, Part 2, is silent as to the procedure for review of decisions on subdivision applications. But prior North Carolina case law authorized review in a certiorari proceeding, *Springdale Estates Associates v. Wake County*, 47 N.C.App. 462, 267 S.E.2d 415 (1980), and the Chapel Hill Development Ordinance purportedly required that judicial review be obtained in this manner. Therefore, petitioner felt compelled to join a petition for certiorari with the complaint out of concern that a superior court might conclude that certiorari was petitioner's *exclusive* remedy. However, having added the petition for writ of certiorari, petitioner sought and obtained a clarifying ruling from the trial court that the writ of certiorari was to be issued solely for the ancillary purpose of bringing before the court the records that were before the town council, and that the action was otherwise to proceed "according to the rules of evidence and procedure governing a civil action at law rather than the rules applicable to a

proceeding in the nature of certiorari" (*infra*, p. 56a). This ruling was specifically authorized by a prior decision of the N.C. Supreme Court, *Wilson Realty Co. v. City and County Planning Board for the City of Winston-Salem and Forsyth County*, 243 N.C. 648, 92 S.E.2d 82 (1956).

When it overruled the court of appeals on the joinder issue, the supreme court did not state whether it did so because it disagreed generally with the court of appeals' conclusion that subdivision review could be obtained *either* by certiorari or an original complaint (*infra*, p. 26a), or whether it did so on the basis of Chapel Hill's ordinance provisions (the court recited that "[t]he superior court was sitting as a court of appellate review pursuant to the procedures set out in the Town of Chapel Hill's Development Ordinance at Section 7.6.1.11.") (*infra*, p. 13a). Nevertheless, it is clear in this case that limited review "on the record" was *imposed* by the North Carolina Supreme Court as a prerequisite since the trial court's ruling had allowed petitioner to proceed otherwise, and the hearing that led to the trial court's final decision was strictly on petitioner's motion for summary judgment (as indicated above, neither party moved for a hearing "in the nature of certiorari.") The supreme court, in effect, held that (at least in this case and arguably in all subdivision cases) review of a subdivision denial had to be obtained first in a certiorari proceeding, just as the statutes in this state (and others) require such a procedure to be followed for review of permit decisions under a zoning ordinance. In other words, the court's reversal on the joinder issue, in essence, established an exhaustion requirement by requiring petitioner to follow a procedural path not of her own

choosing as a prerequisite to being heard on her Section 1983 and takings claims. In petitioner's view, the North Carolina Supreme Court's decision is therefore squarely in conflict with the opinion of this Court in *Felder v. Casey*, ___ U.S. ___, 108 S.Ct. 2302 (1988) and must be reversed.

The hardship created by the North Carolina Supreme Court's decision on the joinder issue is compounded by the court's additional conclusion that the factual determination resulting from its review of the certiorari proceeding—that petitioner was required merely to "coordinate" rather than dedicate—constituted a complete bar to further litigation of this issue in the Section 1983 action under the doctrine of *res judicata*. In support of its conclusion, the court cited *University of Tennessee v. Elliott*, 478 U.S. 788 (1986).

Of course, *University of Tennessee v. Elliott* is not the controlling precedent here since, in *Elliott*, the question was what preclusive effect should be given in a Section 1983 action to an *unreviewed* decision of a state administrative agency. But apart from this, petitioner submits that the main error in the court's reasoning is that it departs so dramatically from the decisions of this Court that have allowed a determination in a state forum—judicial or administrative—to have a preclusive effect in a subsequent Section 1983 action *only* when the state proceeding afforded the party a "full and fair opportunity" to litigate federal claims. *See Kremer v. Chemical Construction Corporation*, 456 U.S. 461, 479-483 and cases cited therein. When, as in *Kremer*, an administrative body sits as a neutral fact finder and, following a fair and impartial hearing, makes findings on a factual issue such as whether an employer discharged an employee

for an unlawfully discriminatory reason, a conclusion that the employee had a full and fair opportunity to litigate the discrimination charge seems warranted. However, petitioner presents an entirely different case, one that will be true of *any* plaintiff who believes that development permission has been denied for an unconstitutional reason but is required to seek administrative type review before bringing a Section 1983 challenge. For the gravamen of petitioner's case was that her subdivision application had been turned down for an unconstitutional reason, and the administrative body making the initial determination on *that* issue was the very same council whose decision was challenged. The town council said it rejected petitioner's subdivision for failure to "coordinate" with the parkway, rather than for failure to dedicate right-of-way for it, and the North Carolina Supreme Court held that the reviewing court was bound by the council's finding if there was competent evidence in the record to support it. Inherently, this procedure fails to provide any plaintiff with a full and fair opportunity to establish his or her claim, and that is manifestly so in petitioner's case where both the trial court and court of appeals could find no evidence in the record to suggest that the council rejected petitioner's subdivision for any reason other than those she asserted in her complaint. Under these circumstances, it is apparent that the North Carolina Supreme Court's determination that petitioner is barred from further litigation of her Section 1983 claim is in direct conflict with this Court's decision in *Kremer*. This case, therefore, presents an opportunity to clarify the law in a manner that will not only correct the injustice of the decision below but

will provide much needed guidance in a highly litigated area of the law.

CONCLUSION

The degree to which local governments may use the leverage afforded by their development control ordinances to impose costs on property owners for the benefit of the general public is a question that goes to the very heart of the Fifth Amendment's protections. Some questions have been answered by *Nollan*, but as this case demonstrates, profound injustices can occur even when an exaction takes a more subtle form than an explicit dedication requirement. Moreover, because the decisions of this Court often compel those whose constitutional rights have been violated to seek redress in state court, it is especially important that state courts not be allowed to erect procedural barriers that prevent the full and fair litigation of legitimate constitutional claims. This case presents substantive and procedural issues that are fundamental to the way in which the development control system actually operates in North Carolina and elsewhere, and petitioner therefore requests that this petition for certiorari be granted.

Respectfully submitted,

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Counsel of Record

April 18, 1990

APPENDIX

APPENDIX A

Supreme Court of North Carolina.

No. 121PA89.

Deidre V. BATCH

v.

TOWN OF CHAPEL HILL.

Filed Jan. 18, 1990.

Property owner filed petition for writ of certiorari to review town council decision denying subdivision permit application and filed complaint alleging constitutional violations and seeking damages, costs, and attorney fees in connection with the denial. The Superior Court, Orange County, Anthony M. Brannon, J., ordered town to approve preliminary plat, reserved for trial amount of damages to which property owner would be entitled, and assessed costs and attorney fees against town. Town appealed. The Court of Appeals, 92 N.C.App. 601, 376 S.E.2d 22, affirmed in part, reversed in part and remanded. Discretionary review was granted. The Supreme Court, Martin, J., held that: (1) proceeding on petition for writ of certiorari was improperly joined with cause of action alleged in complaint; (2) town council properly denied approval of subdivision permit application; (3) denial of the application could not form basis for claim that property owner's land was taken without just compensation and without due process of law; and (4) property owner was barred by doctrine of res judicata from reasserting claim that town unlawfully denied approval of subdivision plan.

Reversed and remanded.

On discretionary review of the decision of the Court of Appeals, 92 N.C.App. 601, 376 S.E.2d 22 (1989), affirming in part and reversing in part the order granting summary judgment in favor of the plaintiff entered by Brannon, J., in the Superior Court, Orange County, on 31 December 1987. Heard in the Supreme Court 10 October 1989.

Michael B. Brough & Associates by Michael B. Brough and Frayda S. Bluestein, Chapel Hill, for plaintiff-appellee.

Hunter, Wharton & Lynch by John V. Hunter, III, Raleigh, and Ralph D. Karpinos, Town Atty., Town of Chapel Hill, for defendant-appellant.

Thomas A. McCormick, Jr., City Atty., and Ira J. Botvinick, Deputy City Atty., Raleigh, for City of Raleigh, and S. Ellis Hankins, General Counsel, Raleigh, for N.C. League of Municipalities, amicus curiae.

Gregory D. Porter, Research Triangle Park, for North Carolina Home Builders Ass'n, amicus curiae.

Karen A. Sindelar, Asst. City Atty., Durham, for City of Durham, amicus curiae.

Maupin, Taylor, Ellis & Adams, P.A. by John C. Cooke, Raleigh, and R.S. Radford, Sacramento, Cal., for Pacific Legal Foundation, amicus curiae.

MARTIN, Justice.

This case raises the question of whether the proceeding pursuant to plaintiff's petition for writ of certiorari to review the decision of the Town of Chapel Hill which denied plaintiff's subdivision permit application was properly joined with her cause of action alleging in her complaint constitutional violations and seeking damages, costs, and attorney's fees pursuant to 42 U.S.C. § 1988, 42 U.S.C. § 1983 and N.C. G.S. § 40A-8. Also presented is the further question of whether summary judgment in favor of plaintiff was properly granted as to both proceedings. We hold that these proceedings were improperly joined and

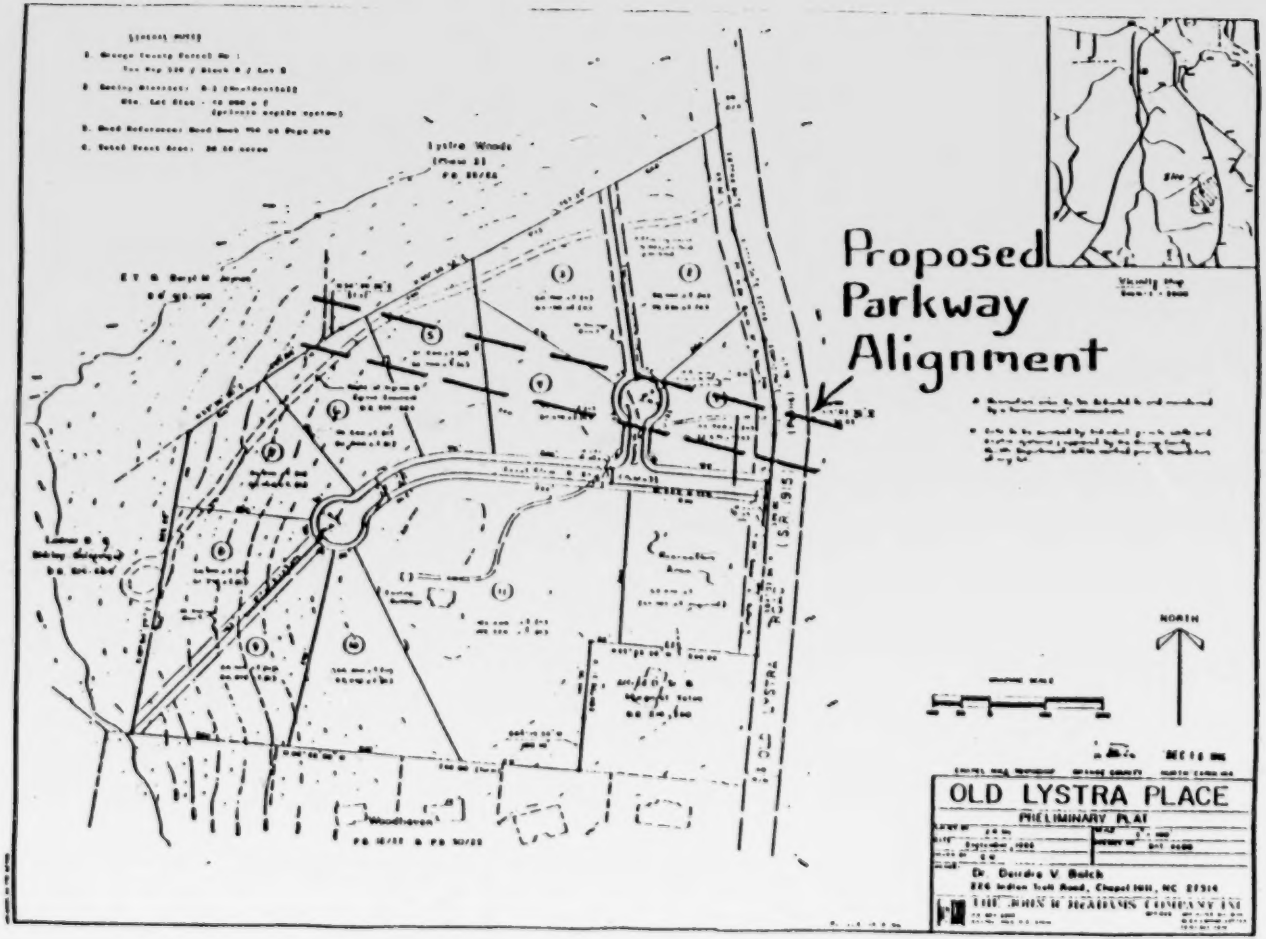
examine each separately in this opinion. Concerning the writ of certiorari, we reverse the Court of Appeals' ruling and order that the decision of the Town Council denying plaintiff's subdivision application be upheld. Turning to the questions raised in plaintiff's complaint, we hold that the Court of Appeals erred in partially affirming the trial court's order of summary judgment in favor of plaintiff and remand the cause to the Court of Appeals for further proceedings consistent with this opinion.

The facts show that on 26 October 1984, the plaintiff, Dr. Deidre V. Batch, purchased a tract of land containing 20.16 acres on Old Lystra Road in Orange County within the extraterritorial planning jurisdiction of the Town of Chapel Hill. Dr. Batch is not a professional land developer and purchased this acreage with the intent of building her personal residence thereon. Sometime after purchasing this property, Dr. Batch decided to subdivide the land while retaining a portion of it for her own use.

Several months prior to Dr. Batch's purchase of this property, the Town of Chapel Hill had adopted the 1983 Chapel Hill/Carrboro Thoroughfare Plan. The Thoroughfare Plan, which is part of the Comprehensive Plan developed by the town pursuant to N.C.G.S. § 160A-174 (1987), includes plans to construct a limited access two lane highway, the Laurel Hill Parkway, in the southern section of Orange County to alleviate traffic congestion resulting from population growth in that area. This parkway, as planned, will pass through the northeast section of Dr. Batch's twenty-acre tract of land.

In pursuit of her goal to subdivide her property, Dr. Batch initially submitted an application to the Town of Chapel Hill for a minor subdivision on 20 June 1986. Dr. Batch submitted a new proposal to the town on 16 September 1986. This new application, which is the subject of the current controversy before this Court, sought permission to subdivide the property into eleven lots. As in-

dicated by the following illustration, the eleven lots as developed would surround two cul-de-sacs to be built on the property, and construction of the proposed Laurel Hill Parkway by the town would significantly interfere with the use of at least four of the anticipated building sites:


Proposed
Parkway
Alignment
NORTH
OLD LYSTRA PLACE
PRELIMINARY PLAT
Dr. Deirdre V. Balch
THE JOHN R. MCADAMS COMPANY, INC.

Internal communications between planning staff members and members of the advisory Planning Board indicated that some staff and advisory board members wanted Dr. Batch to reserve or dedicate space for the proposed Laurel Hill Parkway as a condition of approval of her permit application. Dr. Batch consistently resisted what she perceived to be efforts by the town to compel dedication of her land for the proposed parkway. Dr. Batch's development representative suggested that the town redesign the Thoroughfare Plan to move the parkway. In addition to her concerns about dedication, Dr. Batch further explained her resistance to the parkway's anticipated location on her property in an affidavit submitted to the trial court as part of her summary judgment motion:

> I object to the Laurel Hill Parkway running through my property in part because it would take a substantial portion of my property as well as lower the value of the remaining property. More importantly, however, I object because it would destroy much of the beauty and seclusion that motivated me to purchase the property in the first place.

As part of the major subdivision review process set out in the Chapel Hill Development Ordinance at § 7.6.1.5, Dr. Batch's subdivision permit application was submitted for review by the Chapel Hill Planning Board prior to review by the Town Council itself. The Planning Board conducted a hearing on 6 January 1987 at which Dr. Batch was represented by counsel. Following that hearing, the Planning Board unanimously adopted a resolution recommending denial of the submitted subdivision application. In its resolution, the Planning Board stated that the subdivision "would not comply with the standards of the Town." Among the reasons cited by the Planning Board as grounds for the subdivision's failure to comply with the town's standards was that "[t]he type and arrangement of streets

within the development are not in compliance with nor coordinate with Chapel Hill's Thoroughfare Plan."

Following the decision of the Planning Board, the Chapel Hill Town Manager, David R. Taylor, prepared a memorandum and recommendation to the Town Council dated 25 February 1987. Regarding the proposed Laurel Hill Parkway as it would impact on Dr. Batch's development design, Mr. Taylor stated in this memorandum:

> The applicant's proposed subdivision fails to take into account this future street and would substantially disrupt the adopted Thoroughfare Plan. . . . Laurel Hill Parkway as it is now called was part of the adopted Thoroughfare Plan for several years prior to the most recent update in 1984. . . . The adopted plan and, in particular, this proposed parkway has been taken into account by both Chapel Hill and Carrboro in review of other proposed developments. . . . We believe that the applicant's proposal does not meet requirements of having streets which coordinate with existing and planned streets as authorized by statute and ordinance."

A hearing was held on 9 March 1987 before the Chapel Hill Town Council. At the request of Dr. Batch's counsel, all evidence was received under oath and cross-examination was allowed.

At the hearing, the Town Manager's recommendation was presented by Planning Director Roger Waldon who was cross-examined by Dr. Batch's attorney. Dr. Batch's developer testified on her behalf, and plats of the proposed development, as well as maps illustrating the relationship of the proposed parkway to the proposed subdivision, were submitted into evidence. There was no evidence in the record before the Town Council of any efforts on behalf of the town to require plaintiff to dedicate land for the right-of-way of Laurel Hill Parkway as a condition for approval of plaintiff's proposed subdivision.

At the conclusion of the hearing, the council voted unanimously to deny the subdivision application and adopted the following resolution:

> BE IT RESOLVED that the Council of the Town of Chapel Hill finds that the subdivision proposed by Dr. Deirdre V. Batch, on property identified as Chapel Hill Township Tax Map 122, Block B, Lot 2, if developed according to the plat dated September 1986 would not comply with all applicable regulations of the Town. The Council finds that the development, as proposed:
>
> 1. Is not consistent with the orderly growth and development of the Town as outlined in the Comprehensive Plan of the Town and, in particular the Land Use Plan, as required by Section 6.5.1 of the Development Ordinance.
>
> 2. Does not have streets which coordinate with existing and planned streets and highways as required by Sections 7.7.1 and 6.5.1 of the Development Ordinance.
>
> 3. Does not create conditions essential to the present and future public health, safety and general welfare as required by the Development Ordinance.
>
> 4. Does not provide for the construction of Community service facilities in accordance with municipal policies and standards as set out in the Comprehensive Plan and as required by Section 7.7.1 of the Development Ordinance.
>
> BE IT FURTHER RESOLVED that the Council hereby denies the application for preliminary plat approval for Old Lystra Subdivison.

Nowhere in the council's resolution, the Planning Board's resolution, the Manager's memorandum to the council, or the testimony of the town's Planning Director at the hear-

ing is there any reference to a requirement that Dr. Batch dedicate any of her property to the town. Rather, these memoranda, resolutions, and testimony consistently refer to the subdivision's failure to coordinate with existing and planned streets or to incorporate the alignment of the parkway right-of-way in its design as one of the reasons for the permit denial. However, the Planning Staff Report of 6 January 1987, indicating that the proposed subdivision failed to "incorporate the alignment of the Laurel Hill Parkway right-of-way into the proposed preliminary plan" and recommending that the plan not be approved because "it does not incorporate the extension of Laurel Hill Parkway," was included in the package of material forwarded to the Town Council members by the Town Manager in preparation for the 9 March 1987 hearing.

Following denial of her subdivision permit application, Dr. Batch filed a combined complaint and petition for writ of certiorari in Orange County Superior Court on 8 April 1987 seeking a declaration that the denial of her application was unlawful and unconstitutional, praying for an injunction to compel the town to approve her application, asking for damages for an unconstitutional taking of her property and for denial of equal protection, seeking compensation for the temporary taking of her property, and requesting an award of costs and attorney's fees. In its answer, the town denied that any unconstitutional violations had occurred and further took the position that the complaint and petition for writ of certiorari should not be combined in one proceeding. On 4 September 1987, the trial court determined that the claims were properly joined and issued a writ of certiorari on 20 October 1987 with respect to the decision of the Town Council denying approval of the subdivision application.

On 21 October 1987, Dr. Batch moved for summary judgment on every count of the complaint and the petition for writ of certiorari as to liability, reserving the issues of damages for later determination. Both parties filed af-

fidavits from a number of potential witnesses with the trial court prior to a 15 December 1987 hearing on Dr. Batch's motion for summary judgment. The trial court heard argument and reviewed the pleadings and affidavits presented at the summary judgment hearing, together with the record of the 9 March 1987 permit hearing before the Town Council pursuant to the writ of certiorari, and determined that there was no genuine issue of material fact concerning the questions raised in Dr. Batch's complaint and writ proceeding. Most significantly, in finding of fact number two the trial court concluded that there was no genuine issue of material fact concerning the town's rationale for denying Dr. Batch's subdivision permit. Rather than accepting the Town Council's statement in its resolution that the subdivision "does not have streets which coordinate with existing and planned streets and highways," the trial court ruled that:

> On March 9th, 1987, the Chapel Hill Town Council adopted its staff's recommendation and denied Plaintiff's application for the following three reasons: (1) Plaintiff failed to indicate on her subdivision an intent to dedicate to the Town of Chapel Hill a right of way for the proposed Laurel Hill Parkway; (2) Plaintiff failed to indicate on her subdivision plat an intent to dedicate to the Town an additional 10 feet of right of way along Old Lystra Road and to improve Old Lystra Road by adding 12 feet of pavement width as well as curb and gutter along the property's approximately 973 feet frontage on that road; (3) Plaintiff failed to indicate in her subdivision application an intent to extend public water and sewer lines to the property.

Based on its factual finding that the town was requiring dedication of land for the Laurel Hill Parkway, the trial court concluded that such a requirement amounted to an unconstitutional taking. The trial court similarly concluded

that denial of the permit for plaintiff's failure to dedicate space for or make improvements to Old Lystra Road amounted to an unconstitutional taking. Finally, the trial court reasoned that the defendant had no statutory authority to deny use of individual well and septic tank systems and its denial of the subdivison application was *ultra vires* and unconstitutional.

At the conclusion of its order resulting from plaintiff's motion for summary judgment, the trial court ordered the Town of Chapel Hill to approve Dr. Batch's preliminary plat as submitted with a minor exception permitting the town to relocate the proposed recreation area; reserved for trial the amount of damages to which plaintiff would be entitled, and assessed costs and attorney's fees against the town.

The town appealed to the Court of Appeals which filed its decision on 7 February 1989. In that opinion, *Batch v. Town of Chapel Hill*, 92 N.C.App. 601, 376 S.E.2d 22 (1989), the Court of Appeals unanimously concluded that it was not error for the trial court to have joined the proceeding pursuant to the writ of certiorari with the complaint and that plaintiff's motion for summary judgment was therefore properly before the trial court. Having determined that the summary judgment motion was properly before the trial court, the Court of Appeals examined the trial court's conclusion that there was no genuine issue of material fact in the case and that plaintiff was therefore entitled to judgment as a matter of law. The Court of Appeals found that one undisputed reason for denial of the subdivision permit was Dr. Batch's failure to dedicate land for the Laurel Hill Parkway:

> Careful review of the affidavits in support of summary judgment, the record of the Town Council meeting of 9 March 1987, other documents properly before the court, and the transcript of the summary judgment hearing, support the Superior Court's conclusions as

> to why the application was denied. Defendant came forward with no evidence that the denial was for any other reason. We affirm the portion of the trial court's order which identifies the reasons for denial of the subdivision application.

Batch v. Town of Chapel Hill, 92 N.C.App. 601, 609-10, 376 S.E.2d 22, 28.

The Court of Appeals next examined the conclusions of law reached by the trial court. The Court of Appeals held that the town's denial of Dr. Batch's permit amounted to an unconstitutional taking. The Court of Appeals further concluded that the imposition of the "Parkway condition," i.e., what it found to be a compulsory dedication requirement, exceeded the statutory authority granted to the Town of Chapel Hill in N.C.G.S. § 160A-174. Additionally, the Court of Appeals' opinion stated that plaintiff's substantive due process rights were violated both because the town's action was *ultra vires* and because the reasons set out by the town for its decision were unconstitutionally vague.

Turning to the "Lystra Road condition," the Court of Appeals reversed the trial court's summary judgment order and remanded the question for further proceedings. Finally, the Court of Appeals affirmed the trial court's decision to invalidate the water and sewer condition as a basis for the town's denial of plaintiff's permit application, while refusing to recognize plaintiff's argument on cross-appeal that the town's denial of the permit on these grounds amounted to an unconstitutional taking of Dr. Batch's entire tract.

Addressing first the question of joinder of the proceeding pursuant to the writ of certiorari with the cause of action alleged in the plaintiff's complaint, we hold that it was error to join them. However, despite the error in joining the two proceedings, we elect not to remand the entire case but rather choose to consider separately the

questions raised by the entry of summary judgment as to the respective proceedings in this appeal.

In reviewing the errors raised by plaintiff's petition for writ of certiorari, the superior court was sitting as a court of appellate review pursuant to the procedures set out in the Town of Chapel Hill's Development Ordinance at § 7.6.1.11. 1 Strong's N.C. Index 3d *Administrative Law* § 6 (1976). In its capacity as an appellate court reviewing the town's quasi-judicial subdivision permit hearing, the superior court could not properly grant summary judgment. Motions for summary judgment are properly heard in the trial courts. *Britt v. Allen*, 12 N.C.App. 399, 183 S.E.2d 303 (1971); W. Shuford, *N.C. Civil Practice and Procedure* § 56-5 (2d ed. 1981). Here, the superior court judge was sitting as an appellate court, not a trial court. Review pursuant to writ of certiorari of an administrative decision is based solely upon the record as certified. The superior court judge may not make additional findings. *Paving Co. v. Highway Commission*, 258 N.C. 691, 129 S.E.2d 245 (1963). The test is whether the findings of fact are supported by competent evidence in the record; if so, they are conclusive upon review. *Jamison v. Kyles*, 271 N.C. 722, 157 S.E.2d 550 (1967). The court may not substitute its findings of fact for those of the agency. *Id.* The sole question before the trial court regarding this administrative proceeding was whether the decision of the Town Council of Chapel Hill was based upon findings of fact supported by competent evidence and whether such findings support the conclusion reached by the town. If even one of the reasons articulated by the town for denial of the subdivision permit is supported by valid enabling legislation and competent evidence on the record, the town's decision must be affirmed. *Jennewein v. City Council of Wilmington*, 62 N.C.App. 89, 93, 302 S.E.2d 7, 9, *disc. rev. denied*, 309 N.C. 461, 307 S.E.2d 365 (1983).

An examination of the administrative record which was correctly before the trial court on review reveals the four

reasons set out by the Town Council in its resolution denying Dr. Batch's subdivision application. Again, these four reasons are that (1) the development is inconsistent with the orderly growth and development of the town; (2) the development does not have streets which coordinate with existing and planned streets and highways; (3) the development does not create conditions essential to the present and future public health, safety and general welfare; and (4) the development does not provide for the construction of community service facilities. These are the findings which were properly before the trial court for review under plaintiff's writ of certiorari challenging the permit denial. The three reasons listed by the trial court for the town's decision are facts found by the trial court, not the Town Council. Not only did the trial court lack authority to make such findings, they are not supported by the evidence. The record contains no evidence before the Town Council to support the trial court's findings.

After careful examination of the proper administrative record on appeal, we hold that there was competent, material and substantial evidence before the Chapel Hill Town Council at its 9 March 1987 hearing to support its second finding that Dr. Batch's subdivision application failed to take into account present and future road plans as set forth in the town's Thoroughfare Plan. At the 9 March 1987 council meeting, the council members were presented with a map of Dr. Batch's proposed subdivision overlaid with a map of the proposed Laurel Hill Parkway. Placed in juxtaposition with one another, these maps clearly illustrate that Dr. Batch's subdivision proposal would place four of eleven large residential building sites directly in the path of the proposed parkway. This evidence alone is sufficient to support the findings contained in the second reason for the town's denial of the permit.

Further, we find no evidence in the record before the Town Council which would support any inference that the

findings and decision of the council were not made in good faith. *Jamison v. Kyles*, 271 N.C. 722, 157 S.E.2d 550.

The Chapel Hill ordinance expressly requires that subdivision plans for streets and driveways shall be in compliance with and coordinate to Chapel Hill's transportation plan. Development Ordinance, § 6.5.1. We hold that failure to comply with this ordinance is a sufficient basis to support the council's refusal to approve plaintiff's subdivision plan. *See Liles v. City of Gresham*, 66 Or.App. 59, 672 P.2d 1229 (1983); *Board of Cty. Com'rs, Etc. v. Gaster*, 285 Md. 233, 401 A.2d 666 (1979)—; *Seal v. Mapleton City*, 598 P.2d 1346 (Utah 1979). *See generally* Mandelker, *Land Use Law* § 9.09 (2d ed.1988).

In view of our decision upholding the town's denial of approval of plaintiff's proposed subdivision for the reasons discussed above, we find it unnecessary to review the other three reasons relied upon by the town in refusing to approve plaintiff's subdivision, and express no opinion as to the validity of these findings by the Town Council.

We hold that the Town Council properly denied plaintiff's petition for approval of her subdivision. The decision of the Court of Appeals contrary to this holding is reversed.

Having determined that there is sufficient evidence on the administrative record to support the Town Council's conclusion that Dr. Batch's proposed subdivision failed to coordinate with existing and planned streets, we next turn to the related questions of whether the town had the authority to impose such a requirement and whether the town's resolution supporting the permit denial was unconstitutionally vague. Under N.C.G.S. § 160A-372, a town is clearly authorized to require a developer to take future as well as present road development into account when designing a subdivision. *See* N.C.G.S. § 153A-331 for parallel

authority for counties. A requirement that a subdivision design accommodate future road plans is not necessarily tantamount to compulsory dedication. Rather, such a requirement might legitimately compel a developer to anticipate planned road development in some logical manner when designing a proposed subdivision.

We hold that in the case before us, the Town of Chapel Hill had authority under its Development Ordinance as authorized by N.C.G.S. § 160A-372 to require Dr. Batch to take future road plans into account in designing her subdivision and further find that denial of her permit for her failure to do so was neither *ultra vires* nor unconstitutionally vague.

We next turn to the question of the propriety of the trial court's decision to grant summary judgment in favor of the plaintiff on the issues raised in her complaint. While the decision to consider a summary judgment motion on the writ of certiorari was improper, it was proper for the motion for summary judgment to come before the trial court on the questions raised in the complaint.

However, in this case the Court of Appeals erred in affirming in part the trial court's granting of summary judgment for the plaintiff upon the causes of action alleged in her complaint. Plaintiff's complaint is based solely upon the alleged improper refusal by the Town Council to approve her subdivision plans. As a result of this alleged improper action, plaintiff alleges that her property has been taken without just compensation, and without due process of law, and that she is entitled to equitable relief and damages. We do not find it necessary to review or decide any of plaintiff's constitutional claims or other issues arising upon her complaint.

It having been determined in this opinion that the Town Council of Chapel Hill properly denied approval of plaintiff's subdivision plan, plaintiff is not as a matter of law entitled to partial summary judgment on her consti-

tutional statutory claims. To the contrary, summary judgment should have been entered for the defendant. The foundation of plaintiff's alleged causes of action having been determined against plaintiff, defendant is entitled to summary judgment in its favor, and plaintiff's complaint should be dismissed. The doctrine of res judicata treats a final judgment as the full measure of relief to be accorded between the same parties on the same claim. To apply the doctrine, there must be a final judgment on the merits in another suit with an identity of issues and parties in the two cases. *State ex rel Utilities Comm. v. Public Staff*, 322 N.C. 689, 370 S.E.2d 567 (1988). Applying this law to the plaintiff's cause of action alleged in her complaint, we conclude that she is barred by the doctrine of res judicata from reasserting her claim that the town unlawfully denied approval of her subdivision plan. The fact that the original claim arose in a quasi-judicial administrative hearing does not affect this result. A final judicial determination of the claim has been rendered by this Court. Furthermore, the fact that plaintiff's complaint alleges violations of 42 U.S.C. section 1983 does not affect our holding. *See University of Tennessee v. Elliott*, 478 U.S. 788, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986) (State court judgments must be given both issue and claim preclusive effect in subsequent 42 U.S.C. section 1983 actions). The decision of the Court of Appeals to the contrary is reversed.

Our decision is based solely upon adequate and independent state grounds. *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983).

We note that plaintiff is not foreclosed from filing another petition with the Town of Chapel Hill for the development of her property as a subdivision or for other use of it.

The case is remanded to the Court of Appeals for further remand to the Superior Court, Orange County for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

APPENDIX B

Court of Appeals of North Carolina.

No. 8815SC340.

Deidre V. BATCH

v.

TOWN OF CHAPEL HILL.

Filed Feb. 7, 1989.

Landowner brought complaint alleging constitutional deprivation and seeking certiorari of town board's denial of extraterritorial subdivision application. The Superior Court, Orange County, Anthony M. Brannon, J., ordered town to approve subdivision plat. On appeal, the Court of Appeals, Arnold, J., held that: (1) landowner could join request for certiorari and complaint together; (2) de novo review was appropriate when claim raised constitutional question; (3) "rational-nexus" test was applicable; (4) town board could not impose as a condition that the right-of-way be granted for city street extension; (5) sewer line extension was not within purview of town board; and (6) court presented a test to determine whether exaction amounts to unconstitutional taking.

Affirmed in part, reversed in part and remanded.

On or about 16 September 1986, plaintiff applied to the Town of Chapel Hill for a permit to subdivide a twenty acre tract into eleven lots within the extraterritorial planning jurisdiction of the town.

After reviewing plaintiff's subdivision application, the town staff informed the plaintiff that the application was,

in the planning staff's judgment, inconsistent with the Town's development ordinance in eight (8) specific respects. In response to the planning staff's review, plaintiff submitted revisions to her application correcting all but three of the deficiencies. Defendant's planning staff recommended denial of the revised subdivision application on the following three (3) bases:

> 1. Plaintiff failed to indicate on her subdivision plat an intent to dedicate to the Town of Chapel Hill a right-of-way through her property for the proposed Laurel Hill Parkway.
>
> 2. Plaintiff failed to indicate on her subdivision plat an intent to dedicate to the Town an additional ten (10) feet of right-of-way along Old Lystra Road and to improve Old Lystra Road by adding an additional twelve (12) feet of pavement width as well as curb and gutter along the property's approximately 973 feet of frontage on that road.
>
> 3. Plaintiff failed to indicate in her subdivision application an intent to extend public water and sewer lines to her property, such extension estimated to cost in excess of $750,000.00.

On 9 March 1987, the Chapel Hill Town Council unanimously adopted its staff's recommendation and denied the plaintiff's application. The following reasons were given for denial of the application:

> 1. Is not consistent with the orderly growth and development of the Town as outlined in the Comprehensive Plan of the Town and, in particular the Land Use Plan, as required by Section 6.5.1 of the Development Ordinance.
>
> 2. Does not have streets which coordinate with existing and planned streets and highways as required by Sections 7.7.1 and 6.5.1 of the Development Ordinance.

3. Does not create conditions essential to the present and future public health, safety and general welfare as required by the Development Ordinance.

4. Does not provide for the construction of Community service facilities in accordance with the municipal policies and standards as set out in the Comprehensive Plan and as required by Section 7.7.1 of the Development Ordinance.

On 8 April 1987, plaintiff filed a Petition for Writ of Certiorari and a Complaint, seeking a declaration that the denial of her application was neither required by the town ordinance, authorized by statute nor constitutional. Plaintiff asserted claims including: (1) violation of due process; (2) taking of property; (3) denial of equal protection; (4) temporary taking; (5) violation of civil rights pursuant to 42 U.S.C. § 1983; (6) inverse condemnation pursuant to N.C. G.S. § 40A-51.

Plaintiff asked the court for an injunction to require approval of her application, damages for unconstitutional deprivation of property and denial of equal protection, and compensation for a temporary taking of her property, including costs and attorneys' fees.

The trial court ruled that the Writ of Certiorari and plaintiff's complaint were properly joined. Upon plaintiff's motion for summary judgment, the court heard argument, and reviewed the record of the proceedings before the Town, supplemented by affidavits. By its order dated 31 December 1987, the court found that the plaintiff had been deprived of her constitutional and civil rights, and that her property had been temporarily taken. The court ordered the Town to approve the applicant's subdivision plat, reserved for trial the question of plaintiff's damages, and assessed the costs of the action including reasonable attorneys' fees against the Defendant. The Town appealed.

Michael B. Brough & Associates by Michael B. Brough and Frayda S. Bluestein, Durham, for appellee.

Ralph D. Karpinos, Town Atty. for the Town of Chapel Hill, Chapel Hill, and Hunter & Wharton by John V. Hunter III, Raleigh, for defendant-appellant.

ARNOLD, Judge.

Summary Judgment granted by the trial court recognized plaintiff's claims for violation of due process, taking, temporary taking, town action which exceeded statutory authority, inverse condemnation, and damages under 42 U.S.C. §§ 1983, 1988. Issues for decision by this Court are whether the trail court properly entertained the motion for summary judgment and, if so, whether it determined correctly that there existed no genuine issue as to any material fact and that the plaintiff was entitled to judgment as a matter of law.

Procedure

As an initial matter it is necessary to resolve whether the trial court erred in allowing the plaintiff to proceed in one action with a petition for certiorari and a complaint. We find that it was an acceptable way to proceed under the North Carolina Rules of Civil Procedure.

Generally, North Carolina allows for liberal joinder of claims:

> A party asserting a claim for relief as an original claim, counterclaim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal or equitable, as he has against an opposing party.

N.C. Rules of Civ.Proc. 18(a). The rule has been interpreted as removing "all restrictions on the number or kinds of claims that may be joined by a party . . . it should no longer be possible to have a misjoinder of claims or causes of action as under the former practice." Shuford, *N.C. Civ.Prac. & Proc.* § 18-3 (3rd Ed.1988).

Proper procedure in this case can be distinguished from zoning case denials because the statutory scheme governing zoning ordinances provides that when a municipality denies a special use or conditional use permit, "every such decision of the city council shall be subject to review by the superior court by proceedings in the nature of certiorari." N.C.G.S. §§ 160A-381, 160A-388. *See Coastal Ready-Mix Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 265 S.E.2d 379, *reh. denied*, 300 N.C. 562, 270 S.E.2d 106 (1980) (conditional use permit denied); *see Charlotte Yacht Club v. County of Mecklenburg*, 64 N.C. App. 477, 307 S.E.2d 595 (1983) (denial of special use permit affirmed).

There is no similar statutory mandate for review of town decisions on subdivision applications. *See* N.C.G.S. §§ 160A-371-376. Further, the North Carolina Supreme Court in *Town of Nags Head v. Tillett*, 314 N.C. 627, 336 S.E.2d 394 (1985), cautioned against relying on "the broad enforcement provisions of N.C.G.S. 160A-389, a zoning statute, as the statutory basis for denying a building permit to one whose lot violates . . . subdivision requirements." *Tillett* at 631, 336 S.E.2d at 397. Similarly, it would be incorrect to limit review of subdivision application denials based on the procedure authorized for zoning application denials.

Though it is true that the Town of Chapel Hill Development Ordinance 7.6.1.11 allows for superior court review "in the nature of certiorari" within thirty days, this provision cannot limit plaintiff's right to bring a complaint against the Town. "Authority to establish rules governing the procedure and practice in superior courts is vested in the General Assembly unless such authority is delegated to the Supreme Court." N.C. Const. art. IV, § 13.(2). *See White Oak Properties v. Town of Carrboro*, 313 N.C. 306, 311, 327 S.E.2d 882, 885 (1985).

When a Board of County Commissioners denied a homeowner association petition to prohibit a developer from

using duplicative names in violation of the county subdivision ordinance, plaintiff association filed a complaint and petition to be treated in the alternative as a petition for judicial review or petition in the nature of a writ for certiorari, and sought an injunction or restraining order prohibiting use of the names. This Court found that the " 'judgment' of the board disregarded" a county ordinance and thus the decision of the Board of Commissioners was reversed. *Springdale Estates Assoc. v. Wake County*, 47 N.C.App. 462, 467, 267 S.E.2d 415, 418 (1980). In analyzing the procedural posture of the case, the court adopted the procedure established in zoning cases:

> Ordinarily, a municipal body, when sitting for the purpose of review, is vested with quasi-judicial powers, and a decision of the board, while subject to review by the courts upon certiorari, will not be disturbed in the absence of arbitrary, oppressive, or manifest abuse of authority, or disregard of the law. The findings of fact made by the commissioners, if supported by evidence introduced at the hearing before the board, are conclusive. But when the findings of the board are not based on competent evidence, the proceedings must be remanded.

Id., citing Refining Co. v. Board of Aldermen, 284 N.C. 458, 469, 202 S.E.2d 129 (1974); *Jarrell v. Board of Adjustment*, 258 N.C. 476, 480, 128 S.E.2d 879 (1963).

We agree that a decision of a town board must be disturbed if it is arbitrary, oppressive or manifests abuse of authority or disregard of the law. We do not agree with any implicit suggestion that review in subdivision cases can only be made upon certiorari as was the case in the zoning cases relied on by the *Springdale* court. *De novo* review is appropriate when a claim raises constitutional questions because "[t]he courts are the sole and final arbiters of the constitutionality of local and state legislation, regulations, and other governmental action." Schnidman,

Handling the Land Use Case § 5.2 (1984 & Supp. p. 221). *See Hylton Enterprises v. Board of Supervisors*, 220 Va. 435, 258 S.E.2d 577 (1979). (When a subdivider contends that disapproval of a plat was not properly based upon the applicable ordinances or was arbitrary or capricious, he may appeal to an appropriate court, which has authority to order approval of the plat.)

As stated in its order dated 4 September 1987, the Superior Court determined that the plaintiff's claims were properly joined:

> . . . [I]t is hereby determined that the writ of certiorari has been joined for the ancillary purpose of bringing up to the Superior Court the records that were before Defendant's Town Council at the hearing of the Plaintiff/Petitioner's application for subdivision approval. This action shall proceed according to the rules of evidence and procedure governing a civil action at law rather than the rules applicable to a proceeding in the nature of certiorari.

The North Carolina Supreme Court has recognized as proper a superior court's exercise of appellate and original jurisdiction in one cause of action. *Wilson Realty Co. v. City and County Planning Board for the City of Winston-Salem and Forsyth County*, 243 N.C. 648, 656, 92 S.E.2d 82, 87 (1956). In *Wilson* the court recognized that the writ of certiorari may be used "as an ancillary writ in a *mandamus* action for the purpose of bringing up from the inferior tribunal . . . records deemed necessary for use in the trial of the case on its merits." *Id.* at 656, 92 S.E.2d at 87. *Mandamus* is an exercise of original, not appellate, jurisdiction. *Id. See* 35 N.C.L.Rev. 180-81 (1957).

Here the use of certiorari as ancillary to plaintiff's complaint is consistent with the definition of certiorari "to bring into superior court the record of the administrative or inferior judicial tribunal for inspection." Black's Law Dictionary (1968) (citations omitted). For reasons enunci-

ated herein, we recognize that denial of subdivision applications may be reviewed by certiorari, or an aggrieved plaintiff may bring an original complaint, or join causes of action as permitted by N.C.Rule of Civ.Proc. 18(a). Therefore, plaintiff's complaint was properly before the superior court, which properly entertained the motion for summary judgment which we are asked to review here.

Summary Judgment

Having determined that summary judgment was properly before the trial court, we must determine whether there is any genuine issue of material fact and that plaintiff is entitled to judgment as a matter of law. *Singleton v. Stewart*, 280 N.C. 460, 186 S.E.2d 400 (1972). Upon motion for summary judgment a court may consider affidavits, depositions, answers to interrogatories, admissions on file "and any other material which would be admissible in evidence or of which judicial notice may properly be taken." *Kessing v. National Mortgage Corporation*, 278 N.C. 523, 180 S.E.2d 823 (1971). *See* Shuford, *N.C.Civ. Prac. & Proc.* § 56-8 (3rd Ed.1988).

The trial court found no genuine dispute as to these material facts:

On 28 October 1986 plaintiff submitted to the defendant an application for approval of a preliminary plat to create a small subdivision consisting of 11 lots, one of which she intended to use as her personal residence. On 9 March 1987, the Chapel Hill Town Council adopted its staff's recommendation and denied plaintiff's application for the following three reasons:

> (1) Plaintiff failed to indicate on her subdivision [plat] an intent to dedicate to the Town of Chapel Hill a right-of-way [through her property] for the proposed Laurel Hill Parkway. (hereinafter "Parkway Condition")

(2) Plaintiff failed to indicate on her subdivision plat an intent to dedicate to the town an additional ten (10) feet of right-of-way along Old Lystra Road and to improve Old Lystra Road by adding an additional twelve (12) feet of pavement width as well as curb and gutter along the property's approximately 973 feet [of] frontage on that road. (hereinafter "Lystra Rd. Condition")

(3) Plaintiff failed to indicate in her subdivision application an intent to extend public water and sewer lines to her property, such extension estimated to cost in excess of $750,000.00. hereinafter "Water and Sewer Condition")

Moreover, the court further concluded that there was no dispute of a material fact, and that, except as set forth above, plaintiff's subdivision application complied with all applicable requirements of the Town of Chapel Hill's development ordinance. Additional facts that the court concluded were undisputed will be discussed below in relevant sections of this opinion.

Defendant contends that there may have been other reasons that the subdivision application was denied. We disagree. Careful review of the affidavits in support of summary judgment, the record of the Town Council meeting of 9 March 1987, other documents properly before the court, and the transcript of the summary judgment hearing, support the Superior Court's conclusions as to why the application was denied. Defendant came forward with no evidence that the denial was for any other reason. We affirm the portion of the trial court's order which identifies the reasons for denial of the subdivision application.

The trial court set out three conclusions of law in its summary judgment order. The first is set out below:

Defendant's denial of Plaintiff's subdivision on the basis of Plaintiff's failure to dedicate right of way nec-

> essary to accommodate the proposed Laurel Hill Parkway is unsupported by any statutory authority, deprives Plaintiff of her property without due process of law, in violation of Article I, Section 19 of the North Carolina Constitution and the 14th Amendment to the United States Constitution and 42 U.S.C. Section 1983, constitutes a temporary taking of that portion of the Plaintiff's property shown within the proposed right of way alignment of the Laurel Hill Parkway in violation of Article 1, Section 19 of the North Carolina Constitution, and, unless compensation is paid pursuant to G.S. Chapter 40A, the town's denial is in violation of the 5th and 14th Amendments to the United States Constitution.

The second conclusion of law found that "[t]he denial of Plaintiff's subdivision application on the basis of Plaintiff's refusal to dedicate the right of way for and make improvements to Old Lystra Rd." was unlawful for the same reasons that a Parkway dedication would be unlawful.

The third conclusion of law determined that the application denial could not be based on plaintiff's refusal to extend public water and sewer lines because defendant "has no statutory authority to deny the use of individual well and septic tank systems that are approved by the Orange County Health Department pursuant to State regulations."

Defendant assigns error to all three conclusions of law.

Parkway Condition

1. Common Law

Despite the fact that the zoning statutes do not limit how a subdivision applicant may seek judicial review, the legal principles applied in review of zoning applications are relevant to subdivision application denial cases because

zoning ordinances and subdivision ordinances both limit private property rights. *Application of Rea*, 272 N.C. 715, 718, 158 S.E.2d 887, 890 (1968). One commentator states:

> Second only to zoning in importance in the land use regulatory picture is subdivision regulation. The official zoning map, along with the text of the zoning ordinance control *what* may be developed on a specific parcel of land; but the subdivision regulations direct *how* such development will occur. Subdivision regulation is the means by which the municipality ensures that the infrastructure necessary for proper functioning of the community . . . is planned and implemented.

Schnidman, *Handling the Land Use Case*, § 1.4, pp 21-22 (1984 & Supp.1988).

When a town council reviews a subdivision application the council sits in a quasi-judicial capacity. *Springdale Estates*. Similarly, " 'when a board of aldermen, a city council, or zoning board hears evidence to determine the existence of facts and conditions upon which the [zoning] ordinance expressly authorizes it to issue a special use permit, it acts in a quasi-judicial capacity.'" *Humble Oil and Refining Co. v. Board of Aldermen*, 286 N.C. 170, 209 S.E.2d 447, 449 (1974), *citing Humble Oil & Refining Co. v. Bd. of Aldermen*, 284 N.C. 458, 202 S.E.2d 129 (1974). In the zoning review context the North Carolina Supreme Court enunciated the "two-step decision-making process" a town board had to follow in granting or denying an application for a special use permit:

> (1) When an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, prima facie he is entitled to it.
>
> (2) A denial of the permit should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record.

Coastal Ready-Mix Concrete Co. v. Board of Commissioners, 299 N.C. 620, 625, 265 S.E.2d 379, 382 *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980) (conditional use permit denied) (citations omitted). Because of the similar issues involved in subdivision applications and zoning variance applications, the rules enunciated above logically extend to govern a subdivision application proceeding.

However, we agree with the defendant that if the denial of the application by the town council was valid for any of the three reasons previously listed, the denial of the subdivision application may stand. *Jennewein v. City of Wilmington*, 62 N.C. App. 89, 93, 302 S.E.2d 7, 9, *rev. denied*, 309 N.C. 461, 307 S.E.2d 365 (1983). Of course, a valid reason, by definition, must be "supported by competent, material and substantial evidence." *Jennewein* at 62 N.C.App. 93, 302 S.E.2d at 9.

2. Fifth Amendment

Plaintiff urges this Court to recognize that the conditions imposed by the town were unlawful exactions of defendant's property and to apply the Fifth Amendment regulatory taking doctrine enunciated in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987). In that case the United States Supreme Court held that the California Coastal Commission could not refuse its grant of permission to rebuild a beach house because the applicants refused to comply with a condition that they transfer to the public an easement across their beachfront property:

> [Though] [t]he access required as a condition of the permit is part of a comprehensive program to provide continuous public access
>
> . . . .
>
> [T]hat does not establish that the Nollans . . . alone can be compelled to contribute to its realization.

> Rather, California is free to advance its "comprehensive program," if it wishes, by using its power of eminent domain for this "public purpose" *see* U.S. Const. Amdmt V; but if it wants an easement across the Nollans' property, it must pay for it.

483 U.S. at ___, 107 S.Ct. at 3150, 97 L.Ed.2d at 692.

Nollan established that a heightened scrutiny "remoteness test" is to be used if a regulation is alleged to violate the takings clause of the Fifth Amendment: the regulation must "substantially advance" a "legitimate state interest." *Id.* at ___, 107 S.Ct. at 3146, 97 L.Ed.2d at 687, *citing Agins v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980). When a takings claim is made under the due process clause of the Fourteenth Amendment, a less strict, "rational basis" analysis is used. *See* R. Freilich, Finetuning the Taking Equation: Applying It to Development Exactions, 40 Land Use Law & Zoning Digest (March 1988). North Carolina has established a test of "reasonableness" to judge a due process challenge to governmental regulation of private property. *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 258 S.E.2d 444 (1979). Plaintiff's substantive due process claim is addressed in another section of this opinion.

Defendant cites many cases for the proposition that "subdivision plans can be denied for failure to comply with a master plan." *Board of County Commissioners v. Gaster*, 285 Md. 233, 401 A.2d 666 (1979). However, this rule cannot be isolated from constitutional issues presented in a case. Defendant asserts that this Court should not decide the case on constitutional grounds when it may be decided on other grounds. This maxim is wrongly applied to cases involving municipal ordinances. *State v. Scoggin*, 236 N.C. 1, 6, 72 S.E.2d 97, 101 (1952) (strictly speaking rule only applies to Legislative Acts).

Like *Nollan* the "Parkway Condition" is an exaction with Fifth Amendment implications:

> [A]n exaction is a condition of development permission that requires a public facility or improvement to be provided at the developer's expense. Most exactions fall into one of four categories: (1) requirements that land be dedicated for street rights-of-way, parks, or utility easements and the like; (2) requirements that improvements be constructed or installed on land so dedicated; (3) requirements that fees be paid in lieu of compliance with dedication or improvement provisions; and (4) requirements that developers pay "impact" or "facility" fees reflecting their respective prorated shares of the cost of providing new roads, utility systems, parks, and similar facilities serving the entire area.

Ducker, *"Taking" Found for Beach Access Dedication Requirement*, 30 Local Gov't Law Bulletin 2, Institute of Government (1987).

Defendant's argument that this case does not raise constitutional issues fails. Specifically focusing on the condition that plaintiff set aside a right-of-way for Laurel Hill Parkway the Defendant argues that it did not necessarily require a dedication of land, but mere accommodation or coordination of a right-of-way with the town's thoroughfare plan. The *Nollan* court categorically refutes defendant's position that a requirement that the plaintiff set aside a right-of-way would not present a constitutional takings issue:

> To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather, (as Justice Brennan contends) "a mere restriction on its use," post [483 U.S.] at ___, n. 3 [107 S.Ct. at 3147, n. 3], 97 L.Ed.2d at 696-97, is to use words in a manner that deprives them of all their ordinary meaning. Indeed, one of the principal uses of the eminent domain power is to assure that the government be able to

> require conveyance of just such interests, so long as it pays for them.

Nollan at ___ , 107 S.Ct. at 3145, 97 L.Ed.2d at 685.

It is important to realize that unlike other takings cases, when an exaction amounts to a physical occupation of property the analysis focuses on whether the specific property right which would be relinquished to fulfill the condition amounts to a taking, regardless of whether the condition imposed " 'has only a minimal economic impact on the owner.' " *Id., citing Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433, 102 S.Ct. 3164, 3174, 73 L.Ed.2d 868 (1982). In *Nollan* the question was whether the building permit condition imposed, dedication of an easement so the public could walk across the beachfront portion of plaintiff's property, amounted to a taking regardless of whether the condition detracted from the economic value of plaintiff's lot. *Id.*

Not all exactions are constitutional takings. Though other state courts have enunciated a preference for one of three distinct tests to answer the question whether an exaction constitutes an unconstitutional taking, the question is one of first impression in North Carolina. *Ducker* at 2. A complete discussion of these tests can be found in Rathkopf, *The Law of Zoning and Planning* § 65.03 at 65-98 n. 21 (1987). "One of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens, which, in all fairness and justice, should be borne by the public as a whole.' " *Nollan*, 483 U.S. at ___ , n. 4, 107 S.Ct. at 3147, n. 4, 97 L.Ed.2d at 688, n. 4 (citing *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960).) An exaction test identifies when an individual property owner should pay for a community improvement and when that cost more fairly lies with the "public as a whole."

In *Nollan*, the Court did not favor a single test to identify when an exaction amounts to a taking under the just

compensation clause. In that case the defendant, California Coastal Commission, proposed a "reasonably related" test. Justice Scalia stated for the Court:

> We can accept, for purposes of discussion, the Commission's proposed test as to how close a "fit" between the condition and the burden is required, because we find that this case does not meet even the most untailored standards.

Id. 483 U.S. at ___, 107 S.Ct. at 3148, 97 L.Ed.2d at 690. In *Nollan* the condition was struck because the court found that the condition did not substantially advance the legitimate government interest. *Id.* An exaction test is used to evaluate a taking only after it has been shown that the exaction "substantially advances a legitimate government interest. *Id.* The court implicitly recognized as valid all three exaction tests, but singled out the California "reasonably related test" as unique to that state. *Id.* at ___, 107 S.Ct. at 3149, 97 L.Ed.2d at 690-91.

The narrowest exaction test requires that the benefit accruing from the exaction be "specifically and uniquely attributable" to the development. That is, the development creates an impact which causes the need for the exaction, and the benefit flowing from the exaction must inure "almost exclusively" to development residents. *Ducker* at 2. *Pioneer Trust & Saving Bank v. Mount Prospect*, 22 Ill.2d 375, 176 N.E.2d 799 (1961); *see Nollan*, 483 U.S. at ___, 107 S.Ct. at 3149, 97 L.Ed.2d at 690.

The second and least demanding test is the "reasonably related" test which finds no exaction when the "proposed development is a contributing factor to the problem sought to be alleviated." *Holmes v. Planning Board of Town of New Castle*, 78 A.D.2d 1, 433 N.Y.S.2d 587 (1980); *see Ayres v. City Council of Los Angeles*, 34 Cal.2d 31, 207 P.2d 1 (1949). This test is justified by a municipality's police power to assure the general welfare. *Id.*

Last, the "rational-nexus" test provides that a subdivider can be required "to bear that portion of the cost which bears a rational nexus to the needs created by, and benefits conferred upon, the subdivision." *Longridge Bldrs. v. Planning Bd. of Twp. of Princeton*, 52 N.J. 348, 245 A.2d 336, 337 (1968); *see Jordan v. Menomonee Falls*, 28 Wis.2d 608, 137 N.W.2d 442 (1966). *Cupp v. Board of Supervisors*, 227 Va. 580, 318 S.E.2d 407 (1984). Though North Carolina has not yet adopted a test which determines when an exaction would be the equivalent of a regulatory taking, statutory authority leads us to conclude that the North Carolina Legislature has indicated that the "rational-nexus test" is the proper test to be adopted in North Carolina.

Statutory Provisions

The North Carolina legislature has delegated to municipalities the power to enact subdivision ordinances. N.C.G.S. § 160A-174. The introductory language of the subdivision enabling statute, N.C.G.S. § 160A-372 states:

> A subdivision control ordinance may provide for the orderly growth and development of the city; for the coordination of streets and highways within proposed subdivisions with existing or planned streets and highways and with other public facilities; for the dedication or reservation of recreation areas *serving residents of the immediate neighborhood within the subdivision or*, alternatively, for provision of funds to be used to acquire recreation areas *serving residents of the development or subdivision or more than one subdivision or development within the immediate area*, and rights-of-way or easements for street and utility purposes including the dedication of rights-of-way. . . . (Emphasis added.)

The emphasized language indicates that the legislature contemplated that any dedication or reservation for rec-

reation areas would directly benefit the subdivision from which the reservation or dedication would be exacted. The statute allows that funds to acquire recreation areas may serve the residents of the subdivision or "more than one subdivision or development *within the immediate area.*" However, the statute further states that:

> Any formula enacted to determine the amount of funds that are to be provided [by the developer to the city to acquire recreational areas] . . . shall be based on the value of the development or subdivision for property tax purposes.

Id. This fund formula proviso comports with rational-nexus theory which provides that: "[t]he cost burden to the developer generally cannot exceed the prorated portion of the costs of providing facilities that can fairly be attributed to the development." *Ducker* at 2.

Concerning exactions for road construction N.C.G.S. § 160A-372 states:

> The ordinance may provide that in lieu of required street construction, a developer may be required to provide funds that the city may use for the construction of roads to serve the occupants, residents, or invitees of the subdivision or development and these funds may be used for roads which serve more than one subdivision or development within the area. . . . Any formula adopted to determine the amount of funds the developer is to pay in lieu of required street construction shall be based on the trips generated from the subdivision or development.

Here the statute clearly ties any exaction for street development to the traffic generated by the subdivision.

However, N.C.G.S. § 160A-372 provides very different instructions when a reservation of a school site shall be required. In that case:

> The ordinance may provide for the reservation of school sites in accordance with comprehensive land use plans approved by the council or the planning agency. . . . Whenever a subdivision is submitted for approval which includes part or all of a school site to be reserved under the plan, the council or planning agency shall immediately notify the board of education and the board shall promptly decide whether it still wishes the site to be reserved. If the board of education does not wish to reserve the site, it shall so notify the council or planning agency and no site shall be reserved. If the board does wish to reserve the site, the subdivision shall not be approved without such reservation. The board of education shall then have 18 months beginning on the date of final approval of the subdivision within which to acquire the site by purchase or by initiating condemnation proceedings. If the board of education has not purchased or begun proceedings to condemn the site within 18 months, the subdivider may treat the land as freed of the reservation.

Thus when a reservation is required for a school, a project which is for the good of the general community, the statute contemplates that a municipality shall exercise its power of eminent domain in a timely fashion. *See* N.C.G.S. § 40A-3.

The portion of trial court's first conclusion of law which found that the condition that plaintiff dedicate a right-of-way or "accommodate" her subdivision plan to the proposed alignment of the Laurel Hill Parkway was unsupported by statutory authority is consistent with our analysis of the subdivision enabling statute. The need for the proposed parkway arises not as a result of the plaintiff's subdivision plan, but because of pre-existing traffic congestion on Highway 15-501 created by the general community, not plaintiff's proposed subdivision. In addition, plans for the parkway are indefinite both as to financing and timing.

Reading the subdivision enabling statute N.C.G.S. § 160A-372 in its entirety it is clear that the introductory language allowing "for the coordination of streets and highways within proposed subdivisions with existing or planned streets and highways . . ." is modified by the formula provision: "[a]ny formula . . . shall be based on the trips generated from the subdivision or development." The forecast of the evidence showed that no car trips from the subdivision were likely to be made on the parkway since the proposed road likely would be limited access. In addition, the impact on 15-501 traffic was expected to be minimal. The Chapel Hill Planning Staff report dated 6 January 1987 states:

> *Traffic Analysis.* The proposed Old Lystra subdivision will generate approximately 110 trips per day. This project will have the most impact on the intersection of Old Lystra and Mt. Carmel Church Roads. During the am peak, which is the most critical at this intersection, vehicles turning onto Mt. Carmel Church Road experience a level C of service. *The addition of traffic from this project will not significantly lower the existing level of service.* (Emphasis added).

The town's own report makes no connection between the need for Laurel Hill Parkway and the plaintiff's subdivision. Therefore, we agree that N.C.G.S. § 160A-372 does not authorize the town of Chapel Hill to impose a condition that the plaintiff dedicate a right-of-way to accommodate the proposed alignment of the Laurel Hill Parkway.

Defendant relies on dicta in *Messer v. Town of Chapel Hill*, 59 N.C.App. 692, 297 S.E.2d 632 (1982), *rev. den.*, 307 N.C. 697, 301 S.E.2d 390 (1983), for the proposition that the subdivision of property is "a privilege and not a right." *Id.* 59 N.C.App. at 696, 297 S.E.2d at 634. Any such notion was refuted in *Nollan:* " 'The right to build on one's own property . . . cannot remotely be described as a "governmental benefit" and the payment of a fee,

dedication of land, etc. does not constitute a constitutionally valid "exchange" for a permit to build.' " L. Bozung, "The 1987 Land Use Trilogy: Keystone, First English and Nollan" presented August 1988, ABA annual meeting. *Citing Nollan*, 483 U.S. at ___ , n. 2, 107 S.Ct. at 3146, n. 2, 97 L.Ed.2d at 687, n. 2. In *Messer* the contested condition required relocation of a recreation area for the use of the immediate subdivision neighborhood. Unlike this case, the *Messer* court found that the town's condition for approval of a subdivision plat was within the grant of authority of N.C.G.S. § 160A-371.

In August of 1987, after plaintiff filed her subdivision application, the legislature enacted the Roadway Corridor Official Map Act (hereinafter Map Act), comprehensive legislation addressing how and when a comprehensive planning map for roads may affect a subdivision developer. Though the Map Act does not specifically affect plaintiff's application, we are guided by its policies in our determination of how to test when an exaction is a taking. The Map Act at N.C.G.S. § 136-44.50 states:

> (a) A roadway corridor official map may be adopted or amended by the governing board of any city within its corporate limits and the extraterritorial jurisdiction of its building permit issuance and subdivision control ordinances or by the Board of Transportation.
>
> * * *
>
> (c) No roadway corridor or any portion thereof placed on an official map shall be effective unless:
>
> (1) The roadway corridor or a portion thereof appears on the Transportation Improvement Program adopted by the Board of Transportation under G.S. 143B- 350(f)(4); or
>
> (2) The roadway corridor or a portion thereof appears on the street system plan adopted pursuant to G.S. 136-66.2, and the adopting city or town has

> adopted a capital improvements plan of 10 years or shorter duration which shows the *estimated cost of acquisition and construction of the designated roadway corridor and the anticipated financing for that project.* [Emphasis added.]

The Transportation Improvement Program provides for a comprehensive schedule of funded improvements within seven years. N.C.G.S. § 143B-350(f)(4). At N.C.G.S. § 136-44.51(b) the Map Act states that

> (b) No application for building permit issuance or subdivision plat approval shall be delayed by the provisions of this section for more than three years from the date of its original submittal.

This last provision was added to assure that an applicant's property rights would not be affected by an indefinite thoroughfare plan.

Exaction

Reading the subdivision enabling statute as a whole, particularly in conjunction with the policies set out in the Official Map Act and the Eminent Domain statutes, it is clear the legislature contemplated that exactions can only be imposed without compensation when the exaction condition meets a need created by the development and that as a result of the exaction there will be a commensurate benefit to the subdivision. However, when a school or road planning scheme for the general community requires an exaction the legislature has contemplated that cities and towns shall exercise their power of eminent domain in a timely and lawful fashion.

Thus, the following rational nexus test is adopted to guide the trial court in evaluating when an exaction is tantamount to a taking under the just compensation clause. The test is based on the principles enunciated in *Nollan*, the rationale of the North Carolina subdivision enabling

statute, and the policy underlying the Map Act. To determine whether an exaction amounts to an unconstitutional taking, the court shall: (1) identify the condition imposed; (2) identify the regulation which caused the condition to be imposed; (3) determine whether the regulation substantially advances a legitimate state interest. If the regulation substantially advances a legitimate state interest, the court shall then determine (4) whether the condition imposed advances that interest; *and* (5) whether the condition imposed is proportionally related to the impact of the development.

This last condition when applied to large planned unit developments has been restated to ask whether "the economies of scale attributable to the magnitude of the development provide the basis for the municipality to require the developer to dedicate land needed for major public improvements or even to build certain improvements." *Schnidman*, § 1.4.2 at 24.

In addition to invalidation because of lack of statutory authority the trial court invalidated the Laurel Hill Parkway condition by recognizing the plaintiff's claim for inverse condemnation, stating that unless compensation is paid as required by the eminent domain statutes a taking will occur.

In its 6 January 1987 report to the Chapel Hill Planning Board the Chapel Hill Planning Department recommended a denial of plaintiff's subdivision application because "the applicant does not incorporate the alignment of the Laurel Hill Parkway right-of-way into the proposed preliminary plan." This memorandum exposes an elemental misconception of the meaning of right-of-way. A right-of-way is "a mere easement in the lands of others obtained by *lawful condemnation to public use or purchase.*" Black's Dictionary (1968) (emphasis added).

As there had been no lawful condemnation or purchase, there was no right-of-way, and therefore no legal standing

to impose the condition unless the condition could meet the exaction test outlined above. First, the condition identified is that plaintiff dedicate, accommodate or reserve a right-of-way to coordinate her plan with the Town of Chapel Hill Thoroughfare Plan and Map, specifically the alignment of the Laurel Hill Parkway.

Second, the regulations relied on by the Chapel Hill Town Council to impose the condition are found at § 6.5.1 and § 7.7.1 of the Chapel Hill Development Ordinance:

> The type and arrangement of streets and driveways within the development shall be in compliance with and coordinate to Chapel Hill's Transportation Plan. § 6.5.1.
>
> The subdivision should be designed with a street network which provides safe, adequate access to all lots within the subdivision, and to properties adjoining the subdivision where such access is deemed desirable for the orderly future development of these properties. However, the design of the street network in a subdivision should not encourage through traffic (the origins and destination of which are external to the subdivision) to use local roads in a subdivision. Further, the various streets, utilities, recreation areas and other community facilities serving a subdivision should be sized and located in conformity with the Comprehensive Plan. § 7.7.1.

The test then asks whether the regulation substantially advances a legitimate state interest. *Nollan*. Like the *Nollan* court we accept for argument's sake that a condition of subdivision approval that a dedication of a right-of-way to preserve the alignment of the proposed parkway substantially advances the legitimate government purpose of placing streets in conformity with the Comprehensive Plan. *See id.* at ___, 107 S.Ct. at 3147, 97 L.Ed.2d at 688.

It is the last step of the test which the Laurel Hill Parkway condition fails to meet because though the con-

dition meets the fourth requirement in that it seems to substantially advance the preservation of the proposed parkway plan, the condition is not proportionally related to the impact of the development, and there is no commensurate benefit to the subdivision for its forfeit of land to preserve the Parkway Plan. Thus, to impose the exaction under these circumstances would deprive the plaintiff of the "economically viable use of her land." *Id.* at ___, 107 S.Ct. at 3146, 97 L.Ed.2d at 687, and in this instance, an imposition of the condition amounts to a taking.

Due Process

The trial court also found that the denial of the plaintiff's subdivision on the basis of her refusal to comply with the Parkway condition deprived the plaintiff of "due process of law in violation of Article I, Section 19 of the North Carolina Constitution, the Law of the Land clause, and the 14th Amendment to the United States Constitution and 42 U.S.C. Section 1983. . . ."

"The terms 'law of the land' and 'due process of law' are synonymous." *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 213, 258 S.E.2d 444, 448 (1979). *But see Henry v. Edmisten*, 315 N.C. 474, 480, 340 S.E.2d 720, 725 (1986). In *A-S-P Associates* a developer alleged that a zoning ordinance creating an historic district was constitutionally invalid. In that case the North Carolina Supreme Court set out several principles to guide an evaluation of a due process challenge to governmental regulation of private property on grounds that it is an invalid exercise of the police power:

> First, is the object of the legislation within the scope of the police power? Second, considering all the surrounding circumstances and particular facts of the case is the means by which the governmental entity has chosen to regulate reasonable? [citations omitted]. This

> second inquiry is two-pronged: (1) Is the statute in its application reasonably necessary to promote the accomplishment of a public good and (2) is the interference with the owner's right to use his property as he deems appropriate reasonable in degree?

Id. 298 N.C. at 214, 258 S.E.2d at 448-9.

Police power can be lawfully exercised to protect the public safety, health, and general welfare. N.C.G.S. § 160A-174. "The police power may be delegated by the State to its municipalities whenever deemed necessary by the Legislature." *A-S-P Associates* at 213-14, 258 S.E.2d at 448 [citations omitted]. In an earlier portion of this opinion we held that the imposition of the Parkway condition exceeded the statutory authority delegated to the Town of Chapel Hill in 160A-174. Though the Chapel Hill Development Ordinance at § 6.5.1 and § 7.7.1 appears facially lawful, to interpret it as authorizing the parkway condition in this case would put it beyond the scope of the delegated police power.

Further evidence of substantive due process violations in this case are found in the vague and general reasons for denial given by the town:

> 1. Is not consistent with the orderly growth and development of the Town as outlined in the Comprehensive Plan of the Town and, in particular the Land Use Plan, as required by Section 6.5.1 of the Development Ordinance.
>
> 2. Does not have streets which coordinate with existing and planned streets and highways as required by Sections 7.7.1 and 6.5.1 of the Development Ordinance.
>
> 3. Does not create conditions essential to the present and future public health, safety and general welfare as required by the Development Ordinance.

> 4. Does not provide for the construction of Community service facilities in accordance with municipal policies and standards as set out in the Comprehensive Plan and as required by Section 7.7.1 of the Development Ordinance.

"Substantive due process involves the clarity, specificity, and reasonableness of the organic laws, ordinances, and other restrictions on the use of private property." *Schnidman* § 3.1.3 at 101-02. When permit applicants challenged denial of a special exception under zoning ordinance the North Carolina Supreme Court stated:

> [T]he commissioners cannot deny applicants a permit in their unguided discretion or, stated differently, refuse it solely because, in their view, a mobile-home park would 'adversely affect the public interest.' The commissioners must also proceed under standards, rules and regulations, uniformly applicable to all who apply for permits.

Application of Ellis, 277 N.C. 419, 425, 178 S.E.2d 77, 81 (1970); *see Woodhouse v. Board of Commissioners of Nags Head*, 299 N.C. 211, 261 S.E.2d 882 (1980) (denial of application for a special use permit reversed).

The Chapel Hill Town Council made no findings of fact when it denied plaintiff's subdivision application. The reasons given for denial were vague and imprecise, though the record clearly indicates the three reasons for denial of the application. In fact, § 7.7.1, which is relied on by the town in its denial calls for a street network within subdivisions which does not encourage through traffic. It is inconsistent to rely on such a provision to fault an applicant for refusing to accommodate a major thoroughfare which would carry external traffic. For the foregoing reasons we affirm that portion of the trial court's order which found that the imposition of the parkway condition violated the plaintiff's due process rights.

Lystra Road

In its second conclusion of law the trial court found that the Lystra Road condition was unsupported by state statute, violated due process, and constituted a temporary taking for which compensation is due. This condition requires the plaintiff to dedicate, according to town requirements, a total of 9,735 square feet of her property for a minor arterial right-of-way. We reverse this portion of the court's summary judgment order to allow the lower court to hear evidence and make findings in light of our discussion of due process, *Nollan*, and the rational nexus test set forth above.

Water and Sewer Condition

In its third conclusion of law the trial court found:

> The denial of Plaintiff's subdivision application on the basis of Plaintiff's refusal to extend public water and sewer lines to her property is unsupported by Defendant's ordinance and is *ultra vires* since Defendant has no statutory authority to deny the use of individual well and septic tank systems that are approved by the Orange County Health Department pursuant to State regulations.

North Carolina adheres to Dillon's Rule, that a local government possesses and can exercise only the following powers and no others: those granted in express words, those necessarily or fairly implied, and those essential to the objects and purposes of the municipal corporation. Any fair, reasonable doubt as to the existence of power is resolved by the courts against the municipality. *Greene v. City of Winston-Salem*, 287 N.C. 66, 213 S.E.2d 231 (1975). The *Greene* court invalidated a municipal ordinance that required sprinkler systems in high-rise buildings. In that case the State Building Code statute required that any local building regulations be approved by the state's Building Code council or be void. *Id.* at 71, 213 S.E.2d at 237.

N.C.G.S. § 160A-174 was relied on by the *Greene* court to invalidate the sprinkler ordinance:

> General ordinance-making power.
>
> (a) A city may by ordinance define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city, and may define and abate nuisances.
>
> (b) A city ordinance shall be consistent with the Constitution and laws of North Carolina and of the United States. An ordinance is not consistent with State or federal law when:
>
> * * *
>
> (5) The ordinance purports to regulate a field for which a State or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation.

Regulation of sanitary sewage systems is set out at N.C.G.S. §§ 130A-333 to 130A-337. The complete and integrated statutory scheme delegates the power to approve septic tank systems to the local board of health. N.C.G.S. § 130A-335(c). In this case the trial court concluded that the plaintiff had received preliminary approval from the Orange County Health Department for septic tank systems on each of the 11 proposed lots. Given the statutory scheme mandated by the legislature, we affirm the portion of the lower court's order invalidating the water and sewer condition.

Finally, we reject plaintiff's argument on cross appeal that the trial court erred in refusing to recognize that denial of the subdivision application on the basis of plaintiff's refusal to extend public water and sewer lines to the property constitutes an unconstitutional taking of plaintiff's entire tract.

For the reasons stated above that portion of the trial court's Conclusions of Law numbered (1): "Parkway Condition" and numbered (3): "Water and sewer condition" are affirmed. We remand for trial evaluation of the "Lystra Rd. condition" in light of our discussion of *Nollan*, exactions, and due process. Only if the plaintiff prevails at trial in proving the invalidity of the "Lystra Rd." condition will it be appropriate to consider plaintiff's remedies.

For the reasons stated above the order of the trial court is affirmed in part, reversed in part and remanded.

WELLS and JOHNSON, JJ., concur.

APPENDIX C

STATE OF NORTH CAROLINA
ORANGE COUNTY
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT

87-CVS-424

DEIDRE V. BATCH,
Plaintiff/Petitioner,

v.

TOWN OF CHAPEL HILL,
Defendant/Respondent.

FILED

1987 DEC 31 PM 1:56

ORANGE COUNTY C.S.C.

BY MC

ORDER

This matter came before the undersigned Judge on December 15th, 1987 for hearing on Plaintiff's Motion for Summary Judgment. Having reviewed the pleadings and affidavits as well as the record of proceedings before the Chapel Hill Town Council brought before the Court pursuant to an ancillary Writ of Certiorari the Court concludes that there is no genuine dispute as to the following material facts:

1. Plaintiff Deirdre V. Batch, a black female, is the owner of a tract of land containing approximately 20 acres located on Old Lystra Road in Orange County, outside the corporate limits of Defendant Town of Chapel Hill but within its extraterritorial planning jurisdiction.

2. On October 28, 1986 Plaintiff submitted to Defendant an application for approval of a preliminary plat to create a small subdivision consisting of 11 lots, one of which she intended to use as her personal residence. On March 9th, 1987, the Chapel Hill Town Council adopted its staff's recommendation and denied Plaintiff's application for the following three reasons: (1) Plaintiff failed to indicate on her subdivision an intent to dedicate to the Town of Chapel Hill a right of way for the proposed Laurel Hill Parkway; (2) Plaintiff failed to indicate on her subdivision plate an intent to dedicate to the Town an additional 10 feet of right of way along Old Lystra Road and to improve Old Lystra Road by adding 12 feet of pavement width as well as curb and gutter along the property's approximately 973 feet frontage on that road; (3) Plaintiff failed to indicate in her subdivision application an intent to extend public water and sewer lines to the property.

3. Except as set forth above, Plaintiff's subdivision application complied with all applicable requirements of the Town of Chapel Hill's development ordinance.

4. Defendant's transportation plan indicates that the purpose of the proposed Laurel Hill Parkway is to alleviate traffic congestion on Highway 15-501 created by development other than Plaintiff's subdivision. The proposed alignment of the Laurel Hill Parkway runs through the northern half of Plaintiff's property and cuts through or destroys the access to six of the 11 lots shown in Plaintiff's preliminary plat application.

5. Chapel Hill planning documents propose that Old Lystra Road be upgraded to the status of a "minor arterial." The record shows that Plaintiff would have to dedicate, according to town requirements, a total of 9,735 square feet or .22 acres of her property for a minor arterial right-of-way. The required paving of the widened street would have cost the Plaintiff approximately $21,000.

6. Plaintiff received on October 27, 1987 preliminary approval from the Orange County Health Department for septic tank systems on each of the proposed 11 lots.

7. In order to provide public sewer service to the proposed subdivision, Plaintiff would be required to extend sewer lines at her expense a distance of approximately 8,500 feet at a cost of approximately $650,000 and also would be required to obtain easements from numerous property owners. To provide public water service, water lines would have to be extended approximately 3,500 feet at a cost of about $105,000.

Based upon the foregoing and other material facts in the record about which there is no genuine dispute, the Court makes the following:

CONCLUSIONS OF LAW

1. Defendant's denial of Plaintiff's subdivision on the basis of Plaintiff's failure to dedicate right of way necessary to accommodate the proposed Laurel Hill Parkway is unsupported by any statutory authority, deprives Plaintiff of her property without due process of law in violation of Article I, Section 19 of the North Carolina Constitution and the 14th Amendment to the United States Constitution and 42 U.S.C. Section 1983, constitutes a temporary taking of that portion of Plaintiff's property shown within the proposed right of way alignment of the Laurel Hill Parkway in violation of Article 1, Section 19 of the North Carolina Constitution, and, unless compensation is paid pursuant to G.S. Chapter 40A, the town's denial is in violation of the 5th and 14th Amendments to the United States Constitution.

2. The denial of Plaintiff's subdivision application on the basis of Plaintiff's refusal to dedicate the right of way for and make improvements to Old Lystra Road is unsupported by state statute, constitutes a deprivation of property without due process of law in violation of Article I,

Section 19 of the North Carolina Constitution and the 14th Amendment to the United States Constitution and 42 U.S.C. Section 1983, constitutes a temporary taking of the 9,735 square feet of Plaintiff's property necessary for the proposed improvements to Old Lystra Road in violation of Article 1, Section 19 of the North Carolina Constitution, and, unless compensation is paid pursuant to G.S. Chapter 40A, the town's denial is in violation of the 5th and 14th Amendments to the United States Constitution.

3. The denial of Plaintiff's subdivision application on the basis of Plaintiff's refusal to extend public water and sewer lines to her property is unsupported by Defendant's ordinance and is *ultra vires* since Defendant has no statutory authority to deny the use of individual well and septic tank systems that are approved by the Orange County Health Department pursuant to state regulations.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Defendant's denial of Plaintiff's subdivision application on the bases set forth above is declared to be unsupported by Defendant's ordinance, *ultra vires* and unconstitutional to the extent set forth above in the Court's conclusions of law.

2. Defendant is ORDERED and ENJOINED to approve Plaintiff's preliminary plat as submitted at its first regular meeting following the execution of this judgment, except that Defendant may, as a condition on approval, require that the recreational area shown on the preliminary plat be located on the property a distance of 50 feet westward of Old Lystra Road.

3. The amount of damages to which Plaintiff is entitled for the consitutional violations set forth above shall be reserved for trial.

4. The costs of this action, including reasonable attorney's fees pursuant to 42 U.S.C. Section 1988 and G.S. 40A-8 are assessed against Defendant. The amount of attorney's fees, if disputed by Defendant, shall be determined following a hearing on Plaintiff's motion to determine such fees.

This the 31 day of December, 1987.

/s/ A.M. Brannon
The Honorable Anthony M. Brannon
Judge Presiding

CERTIFICATE OF SERVICE

The undersigned counsel for Plaintiff/Petitioner, Michael B. Brough, hereby certifies that he has this day served copies of the foregoing Order upon the Defendant/Respondent by hand-delivering copies thereof to their respective counsel of record as follows:

Ralph D. Karpinos
Attorney for Town of Chapel Hill
306 N. Columbia Street
Chapel Hill, North Carolina 27514

John V. Hunter, III
Attorney for Defendant/Respondent
Hunter, Wharton & Howell
1312 Annapolis Drive, Suite 105
Raleigh, North Carolina 27605

This the 4th day of January, 1988.

FAISON, BROWN, FLETCHER & BROUGH

BY: /s/ Michael B. Brough
Michael B. Brough

APPENDIX D

STATE OF NORTH CAROLINA
COUNTY OF ORANGE
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

---

87 CVS 424

DEIRDRE V. BATCH,
Plaintiff/Petitioner

v.

TOWN OF CHAPEL HILL,
Defendant/Respondent

FILED

1987 SEP - 4 PM 1:19

ORANGE COUNTY, C.S.C.

BY KP

ORDER

On August 17, 1987, the undersigned Superior Court Judge heard three motions: (1) Plaintiff/Petitioner's Motion to Amend Complaint, (2) Plaintiff/Petitioner's Motion for Determination that Plaintiff's Claims are Properly Joined, and (3) Defendant's Motion to Strike. After arguments of counsel and submission of briefs, it appears to this Court that Plaintiff's Motion to Amend Complaint and Motion for Determination that Plaintiff's Claims are Properly joined should be granted and that Defendant's Motion to Strike should be denied.

THEREFORE, it is hereby ORDERED:

1. That Plaintiff/Petitioner's Motion to Amend Complaint is hereby granted. Plaintiff/Petitioner's Amended

Complaint and Petition for Writ of Certiorari shall be filed with the Court.

2. That Plaintiff's Motion for Determination that Plaintiff's Claims are Properly Joined is hereby granted. Plaintiff/Petitioner may proceed with her claims under 42 U.S.C. §1983 for denial of equal protection and substantive due process, her claim under N.C.G.S. 40A for inverse condemnation, and her Petition for Writ of Certiorari. These claims are hereby determined to be properly joined, and it is hereby determined that the writ of certiorari has been joined for the ancillary purpose of bringing up to the Superior Court the records that were before Defendant's Town Council at the hearing of the Plaintiff/Petitioner's application for subdivision approval. This action shall proceed according to the rules of evidence and procedure governing a civil action at law rather than the rules applicable to a proceeding in the nature of certiorari. The parties have stipulated that all of the issues to be decided in this matter, except the determination of damages, are non-jury issues, and therefore all of the claims herein shall be heard solely by the Court in the matter set forth in this Order, except for the determination of damages to Plaintiff/Petitioner. Plaintiff/Petitioner, should she prevail on her claims, shall be entitled to seek damages pursuant to 42 U.S.C. §1983, compensation pursuant to N.C.G.S. §40A, and attorney's fees pursuant to N.C.G.S. §40A and 42 U.S.C. §1988.

3. That Defendant's Motion to Strike Count II of Plaintiff/Petitioner's Complaint and Writ of Certiorari claiming a denial of equal protection under 42 U.S.C. §1983 is hereby denied.

This the 4 day of September, 1987.

/s/ A.M. Brannon
Anthony M. Brannon, Judge Presiding

Supreme Court, U.S.
FILED
MAY 18 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1627

In the Supreme Court of the United States

OCTOBER TERM, 1990

DEIRDRE V. BATCH,
PETITIONER

v.

TOWN OF CHAPEL HILL,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF FOR THE RESPONDENT TOWN OF CHAPEL HILL IN OPPOSITION

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BEST AVAILABLE COPY

No. 89-1627

In the Supreme Court of the United States

OCTOBER TERM, 1990

DEIRDRE V. BATCH,
PETITIONER

v.

TOWN OF CHAPEL HILL,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

QUESTIONS PRESENTED FOR REVIEW

1. Can a municipal government, when authorized by state statute, require that a subdivision of property coordinate the development of the property with future street plans of the municipality?

2. Where a local government validly and lawfully rejected a particular plan of subdivision, for failure to coordinate with future streets, was there any violation of the Civil Rights Act, 42 U.S.C. § 1983?

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F.R.Civ.P. 56 5

N.C.R.Civ.P. 56 5

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED IN THE CASE

In addition to the constitutional provisions and statutes cited by the Petitioner, N.C. General Statutes § 160A-372, the statute under which the Town Council of Chapel Hill acted, is relevant and reads in pertinent part as follows:

> A subdivision control ordinance may provide for the orderly growth and development of the city; for the coordination of streets and highways within proposed subdivisions with existing or planned streets and highways and with other public facilities; for the dedication or reservation of recreation areas serving residents of the immediate neighborhood within the subdivision or, alternatively, for provision of funds to be used to acquire recreation areas serving residents of the development or subdivision or more than one subdivision or development within the immediate area, and rights-of-way or easements for street and utility purposes and for the distribution of population and traffic in a manner that will avoid congestion and overcrowding and will create conditions essential to public health, safety, and the general welfare. The ordinance may include requirements that the final plat show sufficient data to determine readily and reproduce accurately on the ground the location, bearing, and length of every street and alley line, lot line, easement boundary line, and other property boundaries, including the radius and other data for curved property lines, to an appropriate accuracy and in conformance with good surveying practice.

STATEMENT OF THE CASE

As Petitioner correctly states in her recital of the facts, she purchased her property, not with the intent to subdivide, but with the intent to live on it. She offered evidence that she was not aware of the future street plans of Town; there was uncontradicted evidence that these

plans were of public record prior to her purchase of the property, having been approved by the Towns of Chapel Hill and Carrboro and the North Carolina Department of Transportation, and that local realtors were aware of the plans and ethically obliged to bring them to the attention of a potential purchaser of property.

The plans showed a two-lane thoroughfare, Laurel Hill Parkway, within a 90-foot right-of-way. Petitioner's proposed subdivision provided for a two-lane subdivision street within a 50-foot right-of-way. The Parkway will provide access to Petitioner's property and allow travel from it to other parts of the surrounding community.

When informed by the planning staff of the Town that her particular proposed subdivision did not coordinate with future street plans, Petitioner made no significant alterations in her subdivision plans; she elected to stand or fall with her original proposal. In acting upon and rejecting that particular proposal, the Town Council did not attempt to require her to give any of her property to the Town, and simply rejected the particular application for failure to comply with the enabling statute and the controlling ordinance, in that the application failed to coordinate with, and was contrary to, the settled future street plans of the Town. We are aware of no evidence in the Record which substantiates Petitioner's argument that the Town acted in order to reduce or altogether avoid future condemnation costs. Additional facts are accurately set forth in the opinion of the Supreme Court of North Carolina.

In the hearing before the trial court, Petitioner offered no evidence that her property becomes totally worthless, nor even evidence that its value would be substantially diminished, by the failure of the Town to approve this one particular subdivision application. The Supreme Court of North Carolina was careful to note that Petitioner is free to make other subdivision applications or to seek to use her property in other ways.

SUMMARY OF ARGUMENT

1. The Town's rejection of one particular subdivision plan for its absolute failure to coordinate with the Town's future street and transportation plans did not constitute a taking of Petitioner's property and infringed no principles of either state or federal law.

2. The proceedings in state court did not deprive the Petitioner of the right to be heard on her claim for violation of the Civil Rights Act; she was heard, and for valid reasons the claim was decided against her.

ARGUMENT AND AUTHORITY

I. THE TOWN LAWFULLY REJECTED PETITIONER'S SUBDIVISION PLAN FOR ITS FAILURE TO COORDINATE WITH PLANNED STREETS; THIS REJECTION DID NOT CONSTITUTE A "TAKING" NOR WAS IT AN EFFORT TO ACQUIRE PETITIONER'S PROPERTY WITHOUT PAYMENT OR AT A REDUCED PRICE.

Subdivision is not a favorite of the law. There is no absolute right to it, normally its denial does not deprive property of all reasonable value, and the usual purpose of subdivision is to allow a significant profit to the subdivider.

What subdivision is really about was well stated in 52 Cornell L.Q. 871, 923 (1968):

> "The subdivider is a manufacturer, processor, and marketer of a product; land is but one of his raw materials. In subdivision control disputes, the developer is not defending hearth and home against the king's intrusion, but simply attempting to maximize his profits from the sale of a finished product. As applied to him, subdivision control exactions are actually business regulations."

Both federal and state decisions have long made it clear that the power of local governments to deny or con-

dition subdivision is indeed broad. The general law was well summarized in 11 A.L.R.2d 524, 537:

> "The contention that conditions imposed upon approval of a proposed subdivision plat or map are invalid as constituting a veiled attempt to exercise the power of eminent domain has, under the facts and circumstances disclosed in the particular cases, been consistently rejected."

In the Fourth Circuit, where this case arose, the Court of Appeals has held that even a requirement of dedication—which Petitioner without basis contends occurred in the case at bar—does not constitute a taking. In *Coastland Corp. v. County of Currituck*, 734 F.2d 175, 179 (4th Cir. 1984), the court said:

> "It is common for subdivision regulations to require the developer to dedicate portions of its land for public streets as a condition precedent to approval of its plat. There is no unconstitutional taking where the land use plan was in effect before the plat was submitted for approval and where the developer was not obliged to dedicate his land as a public street except as a condition to the approval of the plat."

The reliance of the Petitioner on *Nollan v. California Coastal Commission*, 483 U.S. 825 (1978), is definitely misplaced. There, California in effect forbade any reasonable use of the property, except upon the gratuitous dedication by the owner, to the public, of a substantial property right. Contrast the case at bar: Petitioner is not only free to use her property for the purpose for which she bought it; she never introduced any evidence that her failure to obtain approval for one particular design for her subdivision either renders her property worthless or so substantially reduces its value as to amount to the same thing. A glance at the map included in the opinion of the Supreme Court of North Carolina instantly shows that she can divide her property into several lots, no doubt at substantial

profit, while still achieving a result which does not contradict the future street plans of the Town. Her taking claims are not ripe. *MacDonald, Sommer and Frates v. Yolo County*, 477 U.S. 340 (1986).

II. PETITIONER WAS NOT DEPRIVED OF A HEARING ON HER CIVIL RIGHTS ACT CLAIM; SHE WAS HEARD, AND SHE LOST.

Petitioner elected to combine in one proceeding, in the North Carolina trial court, a petition for certiorari to review the decision of the Town Council, and a civil action to state a claim under the Civil Rights Act and other theories. The Town promptly objected to this joinder, but the Petitioner elected to continue with this civil matter in the form she had filed it in the trial court and filed a motion for summary judgment as to all claims. Affidavits were filed by both parties and the trial court held a lengthy hearing on summary judgment. The Supreme Court of North Carolina ultimately determined that the joinder of the two proceedings was procedurally improper, but nevertheless dealt with the merits of both the certiorari proceeding and the complaint. After affirming the Town Council's action based on the administrative record, the Supreme Court of North Carolina quite logically held that if that review reveals no violation of law, the Petitioner simply has no complaint, either under the Civil Rights Act or by any other theory. Of course, under North Carolina Rule 56, as under F.R.Civ.P. 56, a party filing a summary judgment motion always risks an adverse summary judgment.

CONCLUSION

The Town of Chapel Hill submits that the Petition should be denied. Only one of many possible subdivision plans has been disapproved, and for a valid reason; if municipalities could not require that subdivisions coordinate with the future transportation needs of the community, developmental chaos would result. The most significant

aspect of the facts in this case is an absence of fact: the total failure of the Petitioner to show that, without approval of this one particular plan, her property is deprived of all reasonable value and therefore "taken." The Supreme Court of North Carolina properly disposed of the present case, and properly reminded the Petitioner that the door is open for her to submit other and different applications for the reasonable use of her property.

This 14th day of May, 1990.

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CERTIFICATE OF SERVICE

I, John V. Hunter III, attorney for Respondent Town of Chapel Hill, certify that I served the foregoing Memorandum on the 14th day of May, 1990, upon the following parties, and in the manner below specified, by placing three copies thereof for each such party in a separate franked envelope bearing sufficient first-class postage and depositing the same in the United States mail at Raleigh, North Carolina:

Party	Addressee of Party's Copy
Petitioner	Michael B. Brough

Address to Which Party's Copy Mailed (Last Known Address of Addressee)

Michael B. Brough & Assoc.
1829 E. Franklin Street
800-A
Chapel Hill, N.C. 27514

This 16th day of May, 1990.

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MOTION FILED
MAY 18 1990

No. 89-1627

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DEIRDRE V. BATCH,

Petitioner,

v.

TOWN OF CHAPEL HILL, NORTH CAROLINA,

Respondent.

On Petition for Writ of Certiorari to the North Carolina Supreme Court

MOTION OF THE NATIONAL ASSOCIATION OF HOME BUILDERS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF IN SUPPORT OF THE PETITION

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MOTION OF THE NATIONAL ASSOCIATION OF HOME BUILDERS FOR LEAVE TO FILE THE ATTACHED BRIEF *AMICUS CURIAE*

The National Association of Home Builders (NAHB) respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of Petitioner.

The NAHB has received the petitioner's written consent to file this brief as *amicus curiae* in support of petitioner and has filed the letter of consent with the Clerk of this Court. The respondent town has declined our request for consent to file a brief in support of the petition.

The NAHB represents 157,000 builder and associate members organized into approximately 850 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. Its members include not only people and firms that construct and supply single-family homes but also apartment, condominium, commercial and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry.

The Just Compensation Clause and its implementation as a shield against oppressive governmental land use regulation is of paramount importance to the NAHB. The actual availability of compensation for the occasional ordinance that results in a taking is critical to the livelihood of private landowners who either 1) have lost all reasonable economic use of their property solely in order to serve the broader public (i.e., governmental) interests, or 2) are otherwise faced with governmental requirements that fail to substantially advance legitimate governmental interests. The latter type of governmental requirement is presented in this case by the town's defacto conversion of private property into a public highway right-of-way.

The NAHB has been before this Court as an *amicus curiae* or as of counsel on behalf of the property owner in prior "takings" cases involving governments' land use decisions. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, *reh'g denied*, 478 U.S. 1035 (1986); *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985); *San Diego Gas & Electric*

Co. v. City of San Diego, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980). We submit the attached brief to the Court to resolve the question of whether a government that exacts a defacto right-of-way from an individual for the public must pay just compensation to the property owner when the property owner neither contributes to the public's need for the right-of-way nor will benefit from the right-of-way.

This *amicus* sincerely believes that the accompanying brief will greatly assist the Court because our concerns are much broader than those of petitioners. Our members are faced with countless regulatory decisions on a daily basis across the nation that affect the use of privately held land and the ability to provide society with necessary and affordable shelter. The vast majority of these decisions come from local governments and, as pointed out in the accompanying brief, some of these decisions do not respect the constitutionally protected property rights of individuals. While petitioner focuses her arguments on the harm the town of Chapel Hill inflicts on her, our brief addresses the broader mandates of takings law that should be applied against those government decisions that abuse private rights and cites authorities different from those in petitioner's brief.

The government here claims that what it required of the property owner was a lesser interest than that required by the government in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (involving issuance of a permit to build a house conditioned on the grant of an easement to the public to walk across the private property), and, therefore, there is no constitutional transgression. However, the court below

does not even allow a property owner to ask the constitutional question. This type of creative thinking and pleading on the part of a local government and the failure of the judiciary to supervise such actions interferes with the constitutional right of all property owners to use their land subject only to reasonable regulation.

The Town of Chapel Hill does not stand alone in this regard and it is in the interests of our members, who are severely constrained by such governmental creativity, to support a constitutional philosophy that forces government decision makers to respect individual rights.

For the above reasons, this Motion should be granted.

Respectfully submitted,

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May 18, 1990

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DEIRDRE V. BATCH,

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v.

TOWN OF CHAPEL HILL, NORTH CAROLINA,

Respondent.

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The interest of the *amicus curiae* is set forth in the preceding motion for leave to file this brief.

SUMMARY OF THE REASONS FOR GRANTING THE WRIT

This petition is the property owner's last resort to receive just compensation from the defendant town, required by the United States Constitution when property is taken for a public use.[1] If she fails before

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[1] U.S. Const. amend. V, as incorporated by the U.S. Const. amend. XIV. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 307 (1987); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980); *see Chicago, B. & Q. R.Co. v. Chicago*, 166 U.S. 226, 239 (1897).

this Court, she loses for good because the North Carolina Supreme Court ordered the trial court to enter summary judgment for the government.

This case is not about whether the government has the authority to do what it did here. Rather, the constitutional consequence to the government of properly exercising its authority is what is before the Court. This case is about the level of protection afforded by the federal Constitution's Just Compensation clause to an individual, Dr. Deirdre Batch, who has been aggrieved by a town government. Yet the court below ended the discussion after holding that the town had authority to require the owner of land not to build on a substantial portion of it because the town may use it in the future as a highway. The court expressly refused to answer the landowner's question of whether if so authorized the prohibition nonetheless amounts to a taking under the federal Constitution. The egregious failure of a lower court to make the critical distinction between authority questions and constitutional questions requires repair by this Court.

The North Carolina Supreme Court, *Batch v. Town of Chapel Hill*, 387 S.E.2d 655, 663 (N.C. 1990), ruled that the town of Chapel Hill should have been granted summary judgment because of the town council's finding that "Dr. Batch's subdivision application failed to take into account present and future road plans as set forth in the town's Thoroughfare Plan." *Id.* at 662. Whatever distinction respondent and the court below attempt to draw with respect to a formal dedication of a right-of-way, this case deals with a town that exacted from a property owner a defacto highway easement without paying for what the property

owner has lost. And, "[i]t is the owner's loss, not the taker's gain, which is the measure of the value of the property taken." *United States v. Causby*, 328 U.S. 256, 261 (1946). The town's proposed highway will provide no access to Dr. Batch's land, it damages the scenic and residential character of her property, and it is a highway the need for which is not created by her proposed residential use. The prohibition of a use of land to effectuate a legitimate public purpose when the proposed land use has no "essential nexus" to that public purpose should be redressed by the Constitution when the prohibition is not accompanied by recompense for the individual's loss. *Nollan v. California Coastal Commission*, 483 U.S. 825, 837 (1987).

Planning for and acquiring the necessary land and capital to build adequate infrastructure to support our cities and towns is an important goal in maintaining society's quality of life. But propositions that further those ends must respect the property rights and other liberties of individuals. Anything short of that proper respect, as occurred here, is repugnant to the higher considerations expressed in the Constitution. Dr. Batch's Constitutional rights must be confirmed and this *amicus* respectfully requests the Court to grant certiorari in order to send anew the message to all governments that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

REASONS FOR GRANTING THE WRIT

I. THE NORTH CAROLINA SUPREME COURT FAILED TO DISTINGUISH BETWEEN THE WHOLLY SEPARATE QUESTIONS OF THE AUTHORITY OF A GOVERNMENT TO REGULATE AND THE CONSTITUTIONALITY OF OTHERWISE VALID REGULATION

The plaintiff's challenge here is not a threat to comprehensive planning nor is it an attack on the government's willingness and desire to provide for the health, safety and welfare of its citizens. The government is free to plan for future infrastructure and provide for the public good. The Just Compensation Clause "is designed 'not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.' " *Preseault v. Interstate Commerce Commission*, ___U.S. ___, 110 S. Ct. 914, 921 (1990)(citing *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987)); *Accord Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979)("[T]here is no question but that Congress could assure the public a free right of access . . . if it so chose. Whether a statute or regulation that went so far amounted to a 'taking,' however, is an entirely separate question."); *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893, 900 (Fed. Cir. 1986)("the question has got to be faced whether the impact of the regulation here involved was sufficiently severe under the facts, as undisputed or as found, [to effect a taking] and the unchallengeable legality in this proceeding of the regulatory act here involved, does not answer the question or even lead towards an answer.").

The North Carolina Supreme Court specifically condones the town's practice of prohibiting development

based on the property owner's failure "to take into account present and future road plans as set forth in the town's Thoroughfare Plan." *Batch v. Town of Chapel Hill*, 387 S.E.2d 655, 662 (N.C. 1990). The court below then dismissed the property owner's takings challenge and denies the existence of the court of appeals' takings analysis by saying only that the property owner was rightfully prohibited from exercising her right to build on her property. Since the town has the authority to regulate in such a manner, according to the court below, Dr. Batch can not receive any payment for the right-of-way for the highway that the town plans to place through her property. *See Id.* at 663-664. That analysis misses the point. The town may prohibit construction activity so as to preserve the land in a way that does not interfere with its planned highway. But then the next question is whether that prohibition of use amounts to a taking, as was asked and answered in the affirmative by the trier of fact and the state court of appeals. The state Supreme Court does not allow the property owner to even ask the constitutional question.[2]

In support of its conclusion that it need not address the property owner's constitutional claim because of its conclusion that the town had authority to do what

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[2] Whether the state trial court should have found that the town's actions in denying the plat amounted to a taking on a summary judgment motion is yet another wholly separate question. If a ruling on summary judgment was improper, then the property owner should be allowed to offer proof of her constitutional claim (preferably with more takings guidance from this Court) at trial, which the state Supreme Court precludes the owner from doing.

it did to Deirdre Batch, the North Carolina Supreme Court stated that its "decision is based solely on adequate and independent state grounds," *Batch*, 387 S.E.2d at 664. This places the new federalism on its head. Under state constitutional provisions, the state courts are free to provide more protection to individuals than that guaranteed by the United States Constitution. *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 676-677 (1923); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980). But the guarantees of the federal Constitution are the required minimum that all governments must afford to individuals. *Mills v. Rogers*, 457 U.S. 291, 300 (1982). This case concerns the extent to which the Just Compensation Clause of the 5th Amendment to the United States Constitution allows the government to interfere with individual property rights. At minimum, the state courts must give effect to the words and spirit of our federal Constitution and this Court's takings jurisprudence.

II. THE TOWN OF CHAPEL HILL SHOULD NOT BE ALLOWED TO DEPRESS THE VALUE OF DEIRDRE BATCH'S LAND TO REDUCE THE EXPENSE OF THE TOWN'S FUTURE CONDEMNATION AND ITS ACTIONS VIOLATE THIS COURT'S PRINCIPLE THAT THERE MUST BE AN "ESSENTIAL NEXUS" BETWEEN THE GOVERNMENT'S REQUIREMENT AND THE GOVERNMENT'S INTERESTS

Fairness and justice dictate that the public should pay the cost of infrastructure and the land upon which it is placed rather than forcing some people alone to bear those public burdens. *See Andrus v. Allard*, 444 U.S. 51, 65 (1979); *Armstrong v. United States*, 364 U.S. 40, 49 (1960). This is especially so in those situations where, as here, "there is heightened risk that

the purpose [of the government's requirement] is avoidance of the compensation requirement, rather than the stated police power objective." *Nollan*, 483 U.S. at 841. "[T]he question at bottom is upon whom the loss . . . should fall." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

In the future when the town gets ready to build the highway, if the town plans on offering some compensation to the then existing property owners, its actions now are still unconstitutional because government's land use decisions should not be used to depress the value of land to reduce the expense of condemnation. *Urbanizadora Versalles, Inc. v. Rivera Rios*, 701 F.2d 993 (1st Cir. 1983); *United States v. Certain Lands In Truro*, 476 F. Supp. 1031, 1035-36 (D. Mass. 1979); *Hermanson v. Board of County Commissioners*, 595 P.2d 694 (Colo. Ct. App. 1979); *Department of Public Works And Buildings v. Exchange National Bank*, 334 N.E.2d 810 (Ill. App. 1975); 1 Anderson, *American Law of Zoning*, 774-75, §7.31 (1986 and 1989 Supp.); 9 A.L.R. 3d 304, §5(b) (1986 and 1988 Supp.) and cases cited therein; Petition for Certiorari at pgs. 16-17.

This case is very much like the *Nollan* case where Justice Scalia admonished the government in its attempt to compel a property owner to contribute to the realization of an easement, even where the government "may well be right that [the easement] is a good idea." The Court stated in *Nollan* that if the government "wants an easement across the Nollans' property, it must pay for it." *Nollan*, 483 U.S. at 842.

This Court has reiterated that a regulatory taking occurs if *either* the regulation or government action

denies a property owner all or substantially all economically viable use of the property *or* the regulation or government act does not substantially advance a legitimate government interest. *Nollan*, 483 U.S. at 834; *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 485 (1987); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). The importance of maintaining the distinction between these two takings tests should be self-evident. There are occasions where a government's actions substantially advance legitimate government interests but nonetheless deny a particular landowner all economically viable use of the property.[3] Likewise, there are situations, such as in this case, where a government's actions do not deny a landowner all economically viable use of the property but nonetheless do not substantially advance a legitimate government interest. *Nollan*, 483 U.S. 825. In either situation, an analysis of both tests may be necessary to protect individuals against those situations where it would be unfair to impose costs on an individual that properly belong with the public. Of course, in some cases the regulation will fail on both counts. *Seawall Associates v. City of New York*, 542

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[3] *See, e.g., 1902 Atlantic Limited v. Hudson*, 574 F. Supp. 1381, 1404-05 (E.D. Va. 1983); *Florida Rock Industries, Inc. v. United States*, 22 Env't Rep. Cas. (BNA) 1943 (Cl. Ct. 1985), *aff'd in part, vacated in part and remanded*, 791 F.2d 893 (Fed. Cir. 1986); *Cf. United States v. Riverside Bayview Homes*, 474 U.S. 121, 127 (1985)(While ruling on the Clean Water Act's jurisdiction to regulate certain wetlands, the Court noted that a property owner can bring a takings claim in U.S. Claims Court if a dredge or fill permit is applied for and denied and the "effect of the denial is to prevent 'economically viable' use of the land in question").

N.E.2d 1059, 1065-66, 544 N.Y.S.2d 542, 548-49, *cert. denied*, ___ U.S. ___, 110 S. Ct. 500 (1989).

The petitioner here does not allege that the town's actions denied her all economically viable use of her property, but did assert from the beginning that the town's actions violated the second takings test. *See Batch v. Town of Chapel Hill*, 376 S.E.2d 22, 29 (1989), *rev'd*, 387 S.E.2d 655 (1990). Therefore, the Court need only look at whether the town's requirement that she not develop a significant portion of her property substantially advances, in the Constitutional sense, the town's legitimate interest in planning for a highway.

To avoid the payment of just compensation, this *amicus* believes this Court's opinions stating that a government's actions must "substantially advance a legitimate government interest" mandates, in the takings context, a direct connection (the Court's "essential nexus") between the government action and both the burden the individual places on the community (in this case, by her proposed land use) and the benefits the individual will receive from the government action (in this case, the benefit, if any, she will receive from the highway). *See Nollan*, 483 U.S. at 837. This direct connection requirement can be characterized as a balancing test, but the Court has stated that it requires more than the standards applied in due process or equal protection cases. *Nollan*, 483 U.S. at 834 n.3. The traditional due process standard that says "the State 'could rationally have decided' the measure adopted might achieve the State's objective" is not sufficient when analyzing government actions under the Just Compensation clause. *Id.*

The burden on the public produced by an individual and the benefit a governmental requirement extends to the individual must be part of the equation when evaluating the takings implications of a governmental act. It makes no sense to look at whether a particular requirement substantially advances a legitimate government interest without considering the relationships of the requirement and the government interest to the individual. Without the specific individual and the property interests he or she holds in the takings formula, the purpose of the Just Compensation Clause is destroyed.

While this *amicus* and many others hope for more takings guidance from this Court, it is not necessary in order to decide this case that the Court determine precisely how far beyond traditional due process standards the Just Compensation clause takes a court's review of governmental actions. For here, there is no direct, indirect or any other connection between the government action and either the burden the individual places on the community or the benefits received by the individual. Simply put, where the government requires a property owner to effectively grant a highway right-of-way that has *no* connection to the relevant burdens imposed on the community by the proposed land use or will not benefit the proposed land use, the government may preserve such private property only by the constitutional way of paying for the required land.

The property owner asserts that a dedication of land, a formal process under state laws to transfer private property to the government, was required by the town. We agree with petitioner and believe a dedication was required by Chapel Hill here. But even

if a formal dedication was not imposed on Dr. Batch as the North Carolina Supreme Court argues, *Batch v. Town of Chapel Hill*, 387 S.E.2d at 660-61, contrary to the North Carolina Supreme Court's opinion, *Id.* at 663, a requirement, proper as it is, that a property owner "take future as well as present road development into account when designing a subdivision" is just as damaging to the property owner's interests as a requirement to formally dedicate the land or grant an easement to the government for the future road. In order to "take into account" future road development the property owner must forego building on the property where the road will be placed. Regardless of what Chapel Hill or the court below call it, their definitions are distinctions without a difference. Dr. Batch, in effect, must grant to the public "a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." *Nollan*, 483 U.S. at 832. Moreover, citing to *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979), Justice O'Connor has said " '[E]ven if the Government physically invades only an easement in property, it must nonetheless pay just compensation.' The Government's appropriation of other, lesser servitudes may also impose a burden requiring payment of just compensation. See *United States v. Causby*, 328 U.S. 256 (1946); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922)." *Preseault v. Interstate Commerce Commission*, ___ U.S. ___, 110 S. Ct. 914, 928 (1990)(J. O'Connor concurring).

III. THIS CASE IS AN EXAMPLE OF THE CONDITION OF LOCAL LAND USE PRACTICE THAT REQUIRES THIS COURT TO REITERATE THE ADMONITION THAT WITHIN THE SCHEME OF REGULATING PRIVATE ACTIONS PURSUANT TO POLICE POWERS THE GOVERNMENT MUST RESPECT THE CONSTITUTIONAL RIGHTS OF INDIVIDUAL CITIZENS

Few developers and builders litigate when municipal governments unfairly and unconstitutionally exact fees and property that have little relation to the services or benefits provided to a proposed project or the burdens placed on the community by the project. These entities, unlike Mr. and Mrs. Nollan, First English Evangelical Lutheran Church, and Dr. Deirdre Batch in this case, are entrepreneurs and businesses that simply find it not practical in almost all cases to challenge unconstitutional government requirements. In a national symposium on development exactions, Professor Babcock cited examples of abusive exactions and followed with this discussion:

> In each of these cases one can imagine the initial reaction of the "extractee" - outrage. In each case he surely went to his attorney and asked two questions: (1) How long will it take to get a final answer in court if we challenge this condition?; and (2) How much will it cost?
>
> The answers probably were: (1) It will take three to four years, with the possibility of defeat; and (2) It will cost tens if not hundreds of thousands of dollars.
>
> By the time the developer approaches his attorney, he has invested a large sum of front-end money and has a great deal of in-

> terest in obtaining a permit. Moreover, he wants the permit immediately. He takes out his pencil, does some calculating, and decides to pay up. This example is a classic illustration of what I call "municipal leverage."

Babcock, *Foreword to Exactions: A Controversial New Source For Municipal Funds*, 50 Law & Contemp. Problems 1, 2 (1987).

Also, most individual property owners can not afford to hire attorneys and pursue land use litigation and, therefore, like developers and builders, find it impractical to challenge a government action that inversely condemns their property without compensation.

Local governments are often well aware of the amount of time, money and other resources a builder of a large development or of a single house has invested in a project before the first plat application is submitted. Local governments are usually free to exercise their municipal leverage to extract all types of property interests and money from project applicants. Occasionally, courts will scrutinize the exercise of municipal leverage in ringing terms:

> While in general subdivision regulations are a valid exercise of the police power, made necessary by the problems subdivisions create - i.e., greater needs for municipal services and facilities -, the possibility of arbitrariness and unfairness in their application is nonetheless substantial: A municipality could use dedication regulations to exact land or fees from a subdivider far out of proportion to the needs created by his subdivision in order

> to avoid imposing the burden of paying for additional services on all citizens via taxation. To tolerate this situation would be to allow an otherwise acceptable exercise of police power to become grand theft.

Collis v. City of Bloomington, 246 N.W.2d 19, 26 (Minn. 1976);

> We have no doubt the municipality was conscious of the illegality of what it did and for that reason refrained from adopting an ordinance, seeking instead to achieve its ends through the guise of "voluntary" contributions with spurious "agreements" to make them stick.
>
> Defendants argue that even if the payments were illegally extorted, as we think they were, nonetheless plaintiff ought not recover . . . .
>
> . . . .
>
> Defendants' position boils down to the proposition that one who buys with notice of municipal lawlessness thereby becomes bound by it. Thus understood, defendants' position is frivolous.

West Park Ave., Inc. v. Township of Ocean, 224 A.2d 1, 4-5 (N.J. 1966);

> Regulation H requires the dedication of seven-and-one-half per cent of the total land comprising the subdivision without any consideration of the town's need for the land. Moreover, there is evidence, that was improperly excluded, which indicates that some

> developers would be permitted to pay the town the value of the land in lieu of its dedication. This appears to us to be an out-and-out plan of extortion. . . .

J.E.D. Associates, Inc. v. Town of Atkinson, 432 A.2d 12, 14 (N.H. 1981).

The Just Compensation clause is one of the few constraints on the public's use of its regulatory powers over the use of an individual's land. Its full application is needed by property owners of all types to provide some balance to weigh against a municipality's leverage.

As difficult as a takings challenge is for the property owner, the Just Compensation clause should remain a fundamental crutch to support the property owner in fighting the heavy-handed leverage brought to the table by the municipality. The North Carolina Supreme Court's opinion below further deteriorates this constitutional crutch and, by creative drafting, does so without ever citing to this Court's long line of takings cases or even noting the North Carolina Court of Appeals' interpretation of this Court's *Nollan* decision, *Batch v. Town of Chapel Hill*, 376 S.E.2d 22, 34 (N.C. Ct. App. 1989), *rev'd*, 387 S.E.2d 655 (N.C. 1990).

This *amicus* does not mean to suggest that all local governments - counties, cities and towns - are ruthless and unreasonable in conducting the affairs of their daily land use decision making processes. Many, if not most, are reasonable and sincere in their efforts to promote the public's health, safety and welfare. But while too many communities disrespect Constitutional considerations for the sake of political or fi-

nancial expediency, even if only one community forsakes one of its citizen's rights, the Constitutional damage is done and we are all worse off because of it. It is exactly in those situations that Constitutional doctrine must be developed to protect individual rights, including property rights. The courts must step in to correct such damage and restore fairness and justice.

This Court has eloquently stated that the legislature is the domain for identifying the public's interest in legislation.

> An attempt to define [the police power's] reach or trace its outer limits is fruitless, for each case must turn on its own facts. . . . Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation . . . .

Berman v. Parker, 348 U.S. 26, 32 (1954). With equal if not greater force, however, the judiciary must be the guardian of individual and property rights. The legislature defines the scope of the public's interest but when individual and property rights are destroyed in the process, the courts should step in and define when such destruction goes too far and insure that adequate remedies exist to redress such loss. The North Carolina Supreme Court has failed to exercise its power of supervision over the conflict between the public's interest and Dr. Batch's property rights as protected by the United States Constitution.

The Court has noted that

> many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them. As Justice Holmes aptly noted more than 50 years ago, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S., at 416.

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 321- 22 (1987).

The Court has produced a long line of takings cases, culminating in its 1987 trilogy of decisions that changed several rules of the land use game, yet left many questions still undecided. *See, First Church*, 482 U.S. 304; *Nollan*, 483 U.S. 825; and *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987). However, a recent article by two of this country's foremost land use law scholars and practitioners provides a forceful indictment of the practice of leaving the development of takings jurisprudence to state courts when it properly belongs within federal court purview. The two authors admittedly have widely varying opinions about many substantive aspects of takings law, citing to their published views on the issue. Professor Daniel R. Mandelker is a self-described "police power hawk," and Michael M. Berger is a land use litigator who generally represents

property owners. And while they disagree on many substantive "takings" issues, they jointly state that

> those substantive differences have not prevented agreement on a fundamental, overriding, procedural issue: Who should be involved in developing the substantive legal precepts for regulatory takings?
>
> The thesis is simple: If, as seems inescapable from the Supreme Court's recent takings decisions, federal constitutional law will control the outcome of these issues [citing to *First Church*, 482 U.S. 304], then the rational conclusion is that the federal courts should take a lead role in formulating the controlling Fifth Amendment jurisprudence. The alternative of leaving the exposition of federal constitutional law to the vagaries of 50 state courts - each attempting to interpret unclear pronouncements from the Supreme Court . . . - can yield only chaos. Even if the Fifth Amendment's protection is eventually to be left to the state courts to implement, it ought to await further development of substantive federal constitutional guidelines by the federal courts. To date, the Supreme Court's decisions have been far too Delphic to provide a solid ground on which the state courts could be expected to act with any consistency.

Mandelker & Berger, *A Plea to Allow the Federal Courts to Clarify the Law of Regulatory Takings*, 42 Land Use Law & Zoning Digest 3 (January 1990). The context of the present case is a perfect vehicle

within which to elaborate on and reaffirm Just Compensation Clause principles.[4]

Local government and state court decisions, such as those below, that vitiate federal Constitutional guarantees must be reversed. Property owners, like Deirdre Batch and the tens of thousands of property owners represented by this *amicus*, have nowhere else to turn, and both the regulators and the regulated await with hope for more United States Supreme Court guidance on this critical issue within the law of the use of privately held American land.

CONCLUSION

For the reasons stated above and in the Petition for Certiorari, this Court is urged to issue a writ of

---

[4] There is no ripeness question in this case since the town will not allow development under any conceivable set of circumstances on that portion of the private land the town wants for its highway and, therefore, the final, definitive position of the town with respect to this issue has been offered the property owner. *See MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 351, *reh'g denied*, 478 U.S. 1035 (1986); *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186-194 (1985). Even if the town could conceive of some use of the property consistent with its desire to preserve a corridor of land for its future highway, the allowed use is irrelevant since the property owner alleges that the requirement to preserve the highway corridor, irrespective of whatever use is allowed, does not substantially advance a legitimate government interest.

As for other ripeness issues, the lower court decision is final because there is no remaining litigation. *See San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 632-633 (1981). Also, the property owner followed the state's inverse condemnation procedures for seeking just compensation in the state courts. *See Hamilton Bank*, 473 U.S. at 194-197.

certiorari to review the judgment and opinion of the North Carolina Supreme Court.

Respectfully Submitted,

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No. 89-1627

In The

Supreme Court of the United States

October Term, 1989

DIEDRE V. BATCH,

Petitioner,

v.

TOWN OF CHAPEL HILL,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of North Carolina

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

This motion of Pacific Legal Foundation (PLF) for leave to file the annexed brief amicus curiae is respectfully submitted pursuant to Supreme Court Rule No. 37. Consent to the filing of this brief has been granted by counsel for petitioner, and has been lodged with the Clerk of this Court. Consent has been withheld by counsel for respondent, Town of Chapel Hill.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has over 20,000 contributors and supporters located throughout the country and maintains its principal office in Sacramento, California. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Amicus seeks here to augment the argument in the petition for writ of certiorari. It is believed that PLF's public policy perspective and litigation experience in support of private property rights will provide an additional viewpoint with respect to the constitutional issues presented. PLF has participated in numerous cases involving issues arising under the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Its attorneys were counsel of record in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF participated as amicus curiae in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

The present case involves an egregious violation of federal constitutional rights in the guise of local land use regulation. The decision below rests on the principle that government may prohibit the otherwise lawful development of private property, if that property may someday

be condemned for public use. In effect, the value of petitioner's property has been permanently depressed in order to minimize the government's subsequent cost of acquisition—if indeed the government ever decides to acquire the property.

This amicus believes the opinion below is in direct conflict with this Court's decision in *Nollan* and other regulatory takings cases. If allowed to stand, the opinion below will constitute a serious setback for individual rights by undermining the constitutional prohibition against taking private property without just compensation. This result would abridge fundamental notions of fairness and equity by unconscionably tipping the constitutional balance in favor of the state's regulatory power over the rights of the individual.

For the foregoing reasons, Pacific Legal Foundation requests that this motion for leave to file the annexed brief amicus curiae be granted.

DATED: May 16, 1990.

Respectfully submitted,

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In The

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

The interests of amicus are set forth in the preceding motion for leave to file brief amicus curiae of Pacific Legal Foundation.

STATEMENT OF THE CASE

This case involves a regulatory taking effected by the Town of Chapel Hill (Town) through its subdivision

approval process. The subdivision application of petitioner, Diedre V. Batch, was denied because she refused to comply with certain conditions demanded by the Town's planning staff. One of these conditions was a requirement that petitioner dedicate a right-of-way for a proposed limited access highway across her property. The Town's desire to build the proposed Laurel Hill Parkway was completely unrelated to petitioner's proposed subdivision. In fact, traffic from petitioner's property would not even have access to the proposed highway.

Upon the Town's rejection of her permit application, petitioner brought this action stating claims for, *inter alia*, an unconstitutional taking of private property without just compensation. The parkway dedication condition was struck down by the trial court on a motion for summary judgment. This portion of the ruling was affirmed by the North Carolina Court of Appeals.

The Supreme Court of North Carolina reversed. In the decision below, the state's highest court held that—contrary to undisputed facts established at trial—the Town had not actually required a "dedication" of petitioner's property for the parkway right-of-way. Instead, the court determined that the Town had required petitioner to "incorporate the alignment of the parkway right-of-way" into the design of her subdivision. *Batch v. Town of Chapel Hill*, No. 121PA89, slip op. at 7 (N.C. Sup. Ct. Jan. 18, 1990). In other words, the court found that petitioner's subdivision permit would be granted if she agreed to forgo development of that part of her property the Town might someday wish to acquire through condemnation. Asserting that the Town was empowered by statute to attach such a condition to the approval of

petitioner's subdivision permit, the state Supreme Court remanded with instructions to dismiss petitioner's federal constitutional claims.

SUMMARY OF THE ARGUMENT

This amicus brief addresses the single issue of a regulatory taking accomplished by the Town's requirement that petitioner dedicate (or "reserve") a right-of-way easement. Despite the insistence of the court below that its decision rests on independent and adequate state grounds, this Court has jurisdiction to review the decision under Supreme Court Rule No. 10.1.(c).

The court below declined to review petitioner's federal constitutional claims, asserting that the taking of petitioner's property was "authorized" by state law. This holding conflicts with this Court's ruling in *Nollan v. California Coastal Commission*, requiring heightened scrutiny of land use regulations challenged under the Takings Clause.

If heightened scrutiny had been applied, as required by *Nollan*, it would be obvious that the Town's subdivision exaction failed to substantially advance a legitimate state interest, and deprived petitioner of economically viable use of her land. Either result would establish a violation of the Takings Clause under *Nollan*.

Finally, the decision below conflicts with the doctrine repeatedly advanced by this Court, that land use regulation may not force certain individuals alone to bear public burdens which should rightfully be borne by the

public as a whole. By requiring petitioner to forgo the development of her land to minimize the cost of subsequent acquisition by the government, the Town has violated the core premise of the Takings Clause as enunciated by this Court in a long line of cases beginning with *Armstrong v. United States*, 346 U.S. 40 (1960).

If the decision below is allowed to stand, petitioner will not be the only party to suffer. This case will put local governments throughout the United States on notice that they may freely abridge individual rights protected by the United States Constitution, so long as their highest state court declines to review the violations.

ARGUMENT

I

THIS COURT HAS JURISDICTION TO REVIEW THE DECISION OF THE SUPREME COURT OF NORTH CAROLINA

The court below asserts that its decision rests "solely upon adequate and independent state grounds." *Batch v. Town of Chapel Hill*, slip op. at 17. This assertion is a transparent attempt to mislead this Court concerning its jurisdiction to review the decision below.

The Supreme Court of North Carolina, having made factual determinations that differ from the trial court's, attempts to dispose of petitioner's claims simply by squaring the new "facts" with state statutory law: "We do not find it necessary to review or decide any of plaintiff's constitutional claims." *Batch*, slip op. at 16. The court below thus relies on the remarkable proposition that its

own state's legislation takes precedence over the United States Constitution in defining petitioner's fundamental rights.

It is unquestioned that a state Supreme Court is the final authority in matters governed wholly by the laws of its state. Moreover, when a state court's decision rests jointly upon state and federal grounds, the United States Supreme Court lacks jurisdiction to review if the state ground is "independent of the federal ground and adequate to support the judgment." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). However, when a state court decision turns on an interpretation of federal constitutional law that conflicts with previous opinions of the United States Supreme Court, this Court's jurisdiction to review is established under Supreme Court Rule No. 10.1.(c).

The present case raised substantive federal issues, including a violation of the Takings Clause of the Fifth Amendment, from its initial stage of litigation. These issues were decided by the trial court and reviewed by the North Carolina Court of Appeals. The takings issue was extensively briefed by the parties, by this amicus, and by other amici before the Supreme Court of North Carolina. That court's failure to address these issues cannot alter the reality that the issues were before the court.

The decision below pretends to avoid addressing petitioner's federal constitutional rights, but in fact disposes of them by denying their existence. As this case clearly demonstrates, when a court fails to adjudicate an individual's rights, it deprives her of them.

Under the Takings Clause of the Fifth Amendment, "a uniform national 'floor' of protection is established, below which no . . . citizen may be made to stand. The Constitution requires that all states rise at least to the same minimum level of justice." Note, *Ohio v. Johnson: The Continuing Demise of the Adequate and Independent State Ground Rule*, 57 U. Colo. L. Rev. 395, 408 (1986). The decision below deprives petitioner of the minimum level of justice required by the Constitution. Merely draping this deprivation in the mantle of "independent state grounds" cannot insulate the decision below from review by this Court.

II

THE DECISION BELOW, IF ALLOWED TO STAND, WILL RESULT IN A TAKING OF PETITIONER'S PROPERTY WITHOUT JUST COMPENSATION

The court below places great emphasis on its finding of facts different from those established before the trial court. *Irrespective of which set of facts pertain*, however, the Town's actions plainly violate the Takings Clause of the Fifth Amendment. This conclusion follows from a straightforward application of current constitutional standards as expressed by this Court.

This Court has repeatedly stated that land use regulations will effect a taking of private property if they fail to "substantially advance legitimate state interests," or if they "den[y] an owner economically viable use" of property. *Nollan v. California Coastal Commission*, 483 U.S. at 834 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)). In *Nollan*, this Court reiterated the foregoing threshold test, emphasizing that a heightened level of

judicial scrutiny must be applied in reviewing land use regulations which are claimed to constitute a taking. *Id.* at 834.

Unfortunately, this lesson was lost on the court below. Far from subjecting the Town's subdivision exaction to the heightened scrutiny required by *Nollan*, the North Carolina Supreme Court began and ended its inquiry with a simple assertion that the Town's actions were "authorized" by state law. *Batch*, slip op. at 15. This degree of scrutiny—amounting to no scrutiny at all—is grossly inadequate under the standards laid down by this Court in *Nollan*.

Like the present case, *Nollan* dealt with restrictive land use regulations imposed as a condition to the issuance of a required permit. One essential lesson of *Nollan* is that such conditions must be reasonably calculated to relieve a public burden created by the proposed use of the property in question. In the present case, however, the Town's desire to construct a parkway is totally unrelated to any burden created by petitioner's proposed subdivision. The subdivision's streets will not directly connect with the parkway, which is a limited access facility. *Batch v. Town of Chapel Hill*, 92 N.C. App. 601, 618, 376 S.E.2d 22, 32-33 (1989). The indirect, incremental traffic flow attributable to the subdivision will be minimal. *Id.* In short, there is no relationship whatever between the need for the parkway and petitioner's proposed use of her land.

This Court has not defined the precise "fit" required between a land use exaction and the burden created by the development. *See Nollan*, 483 U.S. at 838. It hardly

matters what test is applied to petitioner's case, however, because it is clear that the parkway exaction, like the permit condition in *Nollan*, "does not meet even the most untailored standards." *Nollan*, 483 U.S. at 838. The lack of nexus between the parkway exaction and any public burden created by petitioner's proposed subdivision provides sufficient grounds for concluding—regardless of the existence of statutory authority—that the Town's actions failed to substantially advance a legitimate state interest as that phrase was applied to land use regulations by this Court in *Nollan*.

When the parkway exaction is subjected to the heightened scrutiny required by *Nollan*, it is apparent that its actual purpose is identical to that of the condition demanded by the California Coastal Commission in the latter case: "the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation." *Nollan*, 483 U.S. at 837.

Regardless of whether the Town required an outright dedication or a mere "reservation" of an undeveloped right-of-way across petitioner's property, the purpose of this exaction was simply to reduce the Town's ultimate cost of acquiring land for the proposed parkway. *Nollan* leaves no doubt that such an interest is not constitutionally sufficient to justify taking property without compensation. "Whatever may be the outer limits of 'legitimate state interests' in the takings and land use context, this is not one of them." *Id.*

If petitioner had not applied for a subdivision permit, a demand by the Town for dedication of the parkway

easement would clearly have comprised a taking. Requiring such a dedication as a permit condition under these circumstances is "not a valid regulation of land use but 'an out-and-out plan of extortion.' " *Id.*

Furthermore, regardless of which version of the "facts" is accepted in this case, the Town's exaction patently deprives petitioner of economically viable use of her property. Two constitutionally protected property interests are violated by the Town's actions. The first is the fee interest in that part of petitioner's land required for the right-of-way easement itself. The second protected interest is petitioner's right to develop the remaining portion of any lots that are rendered unbuildable by dedication or reservation of the easement. *See Seawall Associates v. City of New York*, 542 N.E.2d 1059, 1067 (N.Y. 1989).

Whether the parkway easement is acquired by the Town as an exaction now, or by formal condemnation later, these property interests will be extinguished by what amounts to a straightforward exercise of the government's power of eminent domain. Any such exercise requires just compensation as a matter of law, by the plain language of the Takings Clause.

Even beyond its clear conflict with the standards laid down by this Court in *Nollan*, the Town's actions violate the Takings Clause by requiring petitioner alone to bear what should rightfully be a general public burden. In addition to examining the nature of the state action embodied in land use regulations, and its economic impact on property owners, this Court has assigned unique significance to this question of fundamental equity. "One of

the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *Nollan*, 483 U.S. at 835 n.4 (quoting *Armstrong v. United States*, 346 U.S. at 49). The benefit sought by the Town's subdivision exaction is the acquisition of a right-of-way easement for a public throughway. As previously noted, petitioner would derive no special benefit from the proposed parkway; indeed, her property would not even have direct access to it. Any presumed benefits of the parkway would accrue to the community as a whole. It follows as a general principle of constitutional law that the costs of constructing the parkway, *including the cost of acquiring the right-of-way*, must be financed out of general public revenues. The Town is prohibited under the Fifth and Fourteenth Amendments of the United States Constitution from requiring individual property owners to bear the costs of its land acquisition program.

The parkway exaction is an attempt to secure the easement either at no cost by requiring the actual dedication of land, or at a reduced cost by prohibiting petitioner from developing property that may one day be condemned. In either case, such regulatory abuses are clearly prohibited by the Takings Clause as interpreted by this Court in *Nollan* and other cases.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for writ of certiorari should be granted.

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Respectfully submitted,

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